

IN THE SUPREME COURT OF MISSOURI

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S.C. No.: 94478

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State of Missouri ex rel ISP Minerals, Inc.,  
Relator,

vs.

The Labor and Industrial Relations Commission,  
Respondent.

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**RELATOR'S BRIEF OF ISP MINERALS, INC.**

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### **JURISDICTIONAL STATEMENT**

Michael Alcorn filed a Claim For Compensation against ISP Minerals, for a 10-14-05 injury to his lungs. The parties to the workers' compensation action entered into a Stipulation For Compromise Settlement ("Settlement Agreement"). Under the Settlement Agreement, employer ISP Minerals agreed to pay employee \$36,508, representing an approximate disability of 25% of the body as a whole regarding the lungs. Paragraph 6 the Settlement Agreement stated employer agreed to leave future related pulmonary medical care open through Dr. Joseph Ojile for monitoring care of occupational chemical dust-induced COPD and bronchial reactivity with obstructive airway. On 1-8-09, ALJ Lane approved the Settlement Agreement. Thereafter, employer paid employee \$36,508 to satisfy its obligation under the Settlement Agreement to pay permanent partial disability. An issue arose between employee and employer regarding whether employer was obligated under the Settlement Agreement to provide employee with inhaler medications and whether such medications were necessary to cure or relieve employee's work-related pulmonary condition.

Michael Alcorn filed in the Circuit Court of Iron County an Application For Judgment On Certified Award From The Division Of Workers' Compensation ("Section 287.500 action"). In his Application, brought pursuant to Section 287.500, employee requested the circuit court render judgment in his favor for \$36,508 plus future medical costs of medical care for occupational chemical dust-induced COPD and bronchial reactivity with obstructive airway. On 5-1-14 the circuit court issued its Order And

Judgment in the Section 287.500 action, finding the Industrial Commission retained jurisdiction over the Claim For Compensation, and remanding the action to the Commission for further proceedings.

Thereafter, employee filed in the Missouri Court of Appeals, Southern District, a Petition In Prohibition/Alternative Petition In Mandamus, alleging the circuit court acted in excess of its jurisdiction in remanding the Section 287.500 action to the Industrial Commission.

In addition to the prohibition action, employee filed a Request For Hearing For Medical Treatment with the Industrial Commission on 6-6-14, requesting a hearing to determine whether employer was obligated to pay for inhaler medications under the Settlement Agreement. ISP Minerals filed a Memorandum In Opposition to Alcorn's Request For Hearing For Medical Treatment. Therein, employer asserted the Industrial Commission did not possess jurisdiction to review the approved Settlement Agreement, act on employee's request for hearing on medical care, or remand the Claim to the Division for an evidentiary hearing.

On 7-2-14, the Missouri Court of Appeals, Southern District, issued its Permanent Writ In Prohibition, prohibiting the circuit court from remanding the Section 287.500 action to the Industrial Commission. It ordered the circuit court to vacate the 5-1-14 Order and Judgment, and enter judgment in accordance with Section 287.500. Following issuance of the Southern District's Permanent Writ In Prohibition, employee failed to withdraw his Request For Hearing For Medical Treatment, previously filed with the Industrial Commission.



On 8-14-14, the Industrial Commission issued its Order, remanding the Claim For Compensation to the Division to hear the parties' evidence regarding medical treatment and ISP Minerals' obligation, if any, to provide treatment to employee. In its Order, the Industrial Commission found it possessed jurisdiction to rule on the issue of future medical care, despite the fact ALJ Lane approved the Settlement Agreement on 1-8-09. Specifically, the Industrial Commission found it possessed the authority to determine the necessity and reasonableness of the requested medical care and whether such treatment was causally related to and flowed from the work injury.

On 9-2-14, ISP Minerals filed a Petition In Prohibition/Alternative Petition In Mandamus against Respondent Industrial Commission in the Missouri Court of Appeals, Western District (W.D.77889). ISP Minerals alleged Respondent acted without jurisdiction or in excess of its jurisdiction in finding it possessed authority to determine whether employer was obligated to provide medical care under the approved Settlement Agreement, and remanding the Claim to the Division for an evidentiary hearing on medical care. On 9-2-14, the Missouri Court of Appeals, Western District, issued its Order, denying ISP Minerals' Petition In Prohibition/Alternative Petition In Mandamus.

Thereafter, on 9-23-14, Relator ISP Minerals filed with the instant Court its Petition In Prohibition/Alternative Petition In Mandamus. Therein, Relator argued in issuing its 8-14-14 Order, finding it had jurisdiction to determine if employer was obligated to provide the treatment sought by employee, and remanding the Claim to the Division to hold an evidentiary hearing regarding medical care, Respondent acted in excess of its jurisdiction under the Workers' Compensation Act. Relator contended no

provision of the Act, including Section 287.390, conferred jurisdiction on Respondent to review the approved workers' compensation Settlement, or remand the Claim, previously compromised by the parties under the approved Settlement Agreement, to the Division to hold an evidentiary hearing regarding the parties' obligations under the Settlement Agreement. On 10-28-14, the Court issued its Preliminary Writ of Prohibition. On 11-26-14, Respondent filed its Answer to the Petition In Prohibition/Alternative Petition In Mandamus.

This Court possesses jurisdiction over the present matter, pursuant to Article V, Section 4, of the Constitution of the State of Missouri and Section 530.020, **RSMo**.

## **STATEMENT OF FACTS**

### **Introduction**

No provision of the Workers' Compensation Act, including Section 287.390, governing compromise settlements of compensation claims, confers jurisdiction on the Industrial Commission to review an approved workers' compensation settlement agreement and order an evidentiary hearing regarding the rights and obligations of the parties to that settlement agreement. Respondent Industrial Commission acted without and in excess of its jurisdiction under the Workers' Compensation Act in finding it possessed jurisdiction to review the approved Settlement Agreement and determine employer's obligation thereunder to provide future medical care, and in ordering the Division to hold an evidentiary hearing on the issue of medical treatment. Thus, the Court must make its Preliminary Writ Of Prohibition absolute.

### **Procedural History**

#### **Workers' Compensation Action**

On 10-14-05, Michael Alcorn was employed by ISP Minerals. Michael Alcorn filed an Amended Claim For Compensation, Injury No. 05-120536, against ISP Minerals, alleging injuries to his lungs occurring on 10-14-05 ("workers' compensation action"). Employee averred this injury occurred from inhalation of silica dust as a result of exposure thereto in his occupation. (Ex.1-2).<sup>1</sup> In its Answer to the Amended Claim For

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<sup>1</sup> Matters referred to herein which are contained in the Exhibits will be designated as (Ex. \_\_\_\_).

Compensation, ISP Minerals denied all allegations contained in the Amended Claim, including, but not limited to, a denial that employee sustained accidental injury arising out of and in the course of employment on 10-14-05. (Ex.3). There were multiple disputed issues between the parties to the workers' compensation action, including accident/occupational disease/exposure to occupational chemical dust, medical causation, nature and extent of temporary total disability and permanent partial disability, responsibility for unauthorized medical care, and future medical care. (Ex.4).

The parties in the workers' compensation action entered into a Stipulation For Compromise Settlement. Under the Settlement Agreement, ISP minerals agreed to pay \$36,508 to employee, said payment representing an approximate disability of 25% of the body as a whole, regarding the lungs for alleged occupational chemical dust induced COPD and bronchial reactivity. Under Paragraph 6, the Settlement Agreement stated:

"ER/INS agrees to leave future related pulmonary med. care open./Auth med. care thru Dr. Jos. Ojile of Cadeacus Corp. in St. Louis, Mo for monitoring care of occ chemical dust induced COPD & bronchial reactivity w/ obstructive airway." (Ex.4-5).

On 1-8-09, ALJ Lane approved the Settlement Agreement in the workers' compensation action, in conjunction with employer's waiver of a large third-party subrogation lien. (Ex.4-5).

On 1-22-09, ISP Minerals' workers' compensation carrier issued a check to Michael Alcorn, in the amount of \$36,580, to satisfy employer's obligation to pay permanent partial disability under the Settlement Agreement. Employee received and

accepted this amount. Consistent with its obligation under Paragraph 6 of the Settlement Agreement, ISP Minerals provided to employee, and continues to provide and pay for, authorized medical monitoring care, which includes periodic pulmonary CT scans and follow-up examinations. (Pet.¶10).<sup>2</sup>

Following ALJ Lane's approval of the Settlement Agreement in the workers' compensation action, a dispute arose between Michael Alcorn and ISP Minerals regarding whether employer was obligated under Paragraph 6 of the Settlement Agreement to provide employee with inhaler medications, and whether those medications were necessary to cure or relieve employee's work-related pulmonary condition. There existed a difference of medical opinion regarding the diagnosis of employee's work injury, the medical necessity for use of inhaler medications, and the work-relatedness of such medications. (Pet.¶11).

In an attempt to settle the dispute between himself and ISP Minerals regarding the medical necessity and work-related causal connection of inhaler medications, Michael Alcorn filed with the Industrial Commission a Request For Hearing On Medical Treatment in May 2012. Therein, employee requested the Industrial Commission hold a hearing regarding medical care. (Pet.¶12).

On 5-21-12, ISP Minerals filed with the Industrial Commission its Response To Request For Hearing On Medical Treatment. Employer asserted when ALJ Lane

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<sup>2</sup> Matters referred to herein which are contained in the Petition In Prohibition/Alternative Petition In Mandamus will be designated as (Pet.¶ \_\_\_\_).



approved the Settlement Agreement on 1-8-09, the jurisdiction of the Division and Industrial Commission over employee's Claim For Compensation was exhausted, and thus, the Industrial Commission did not have jurisdiction to review the Settlement Agreement or act on employee's request for hearing. On 6-18-12, employee withdrew his Request For Evidentiary Hearing On Medical Treatment. (Pet.¶¶13,14).

#### **Section 287.500 Action**

On 7-20-13, Michael Alcorn filed in the Circuit Court of Iron County an Application For Judgment On Certified Award From The Division Of Workers' Compensation. (Ex.6-10). In his Application, brought pursuant to Section 287.500 of the Workers' Compensation Act, employee alleged a certified award from the Division of Workers' Compensation, entered on 1-8-09, found ISP Minerals liable for benefits to employee, in the amount of \$36,508, plus future medical costs. Employee averred he incurred costs for medication and treatment of his COPD, which medication was prescribed by Dr. Ojile, who employer authorized to treat employee at the time of the Settlement Agreement in the workers' compensation action. Michael Alcorn alleged ISP Minerals refused to pay for the medications, despite a statement from Dr. Ojile the medications were prescribed for his work-related pulmonary condition. Employee requested the circuit court render judgment in his favor for \$36,508, "plus future medical costs of medical care for occupational chemical dust-induced COPD and bronchial reactivity with obstructive airway." (Ex.6-10).

On 8-8-13, the trial court issued its Judgment And Order in the Section 287.500 action. It entered judgment in favor of employee and against employer, in the amount of



\$36,508. The 8-8-13 Judgment And Order contained no provision regarding medical treatment or costs for medical care, as employee sought in his Application. (Ex.11). Thereafter, on 8-20-13, employee filed a Motion To Correct Judgment And Order in the Section 287.500 action. Michael Alcorn alleged the 8-8-13 Judgment And Order failed to include any reference to costs of medical care, as employee sought in his Application. Employee requested the trial court enter judgment on the Settlement Agreement pursuant to Section 287.500, for \$36,508, plus "future medical costs of medical care." (Pet.¶17).

On 8-21-13, the trial court in the Section 287.500 action issued its Judgment And Order, granting judgment in favor of Michael Alcorn, in the amount of \$36,508, and "costs of supported medical care", as outlined in employee's Exhibit A (Settlement Agreement). (Ex.12).

On 8-23-13, ISP Minerals filed its Motion To Set Aside Or Vacate Judgment in the Section 287.500 action. Employer alleged it had previously paid employee the \$36,508 awarded in the 8-21-13 Judgment And Order, and thus, that portion of the Judgment had been fully satisfied. ISP Minerals averred the trial court did not have jurisdiction or statutory authority, sitting in a Section 287.500 action, to grant the future medical costs employee sought in his Application. Specifically, employer argued the only jurisdiction the trial court possessed in the Section 287.500 action was to enter judgment in accordance with the Settlement Agreement, and any attempt by the trial court to make the factual determinations necessary to grant the relief employee sought would be an act in excess of the court's jurisdiction, resulting in a void and unenforceable judgment. (Pet.¶19). On 9-19-13, following a telephone conference with counsel for employee and

employer, the trial court in the Section 287.500 action entered its Order, setting aside the 8-21-13 Judgment And Order. (Pet.¶20).

On 5-1-14, the trial court issued its Order And Judgment in the Section 287.500 action. In its Order And Judgment, the trial court observed the dispute between the parties appeared to be based solely on future medical treatment. It found by the terms of the Settlement Agreement, all of the issues in the workers' compensation action were not fully resolved, and further, the Industrial Commission was keeping the matter open and retained jurisdiction over the issue of future medical care. Finding the Industrial Commission originally acquired jurisdiction, expressly retained jurisdiction, and never lost jurisdiction, the trial court remanded the Section 287.500 action to the Industrial Commission for further proceedings. (Ex.13-17).

On 6-6-14, Michael Alcorn filed in the Missouri Court of Appeals, Southern District, a Petition In Prohibition/Alternative Petition In Mandamus ("prohibition action"). In his prohibition action, employee alleged the trial court acted without and in excess of its jurisdiction in remanding the Section 287.500 action to the Industrial Commission for further proceedings. Employee averred the Industrial Commission was without jurisdiction or authority to enforce a workers' compensation settlement, and thus, the trial court acted in excess of its jurisdiction under the Workers' Compensation Act in remanding the Section 287.500 action to the Commission. (Ex.29-34).

In addition to filing a prohibition action, Michael Alcorn filed a Request For Hearing For Medical Treatment with the Industrial Commission in the workers' compensation action on 6-6-14. Employee requested a hearing to determine whether the

medications Dr. Ojile prescribed should be paid for by ISP Minerals, pursuant to Paragraph 6 of the Settlement Agreement. (Ex.35-38).

Thereafter, on 6-12-14, ISP Minerals filed with the Industrial Commission in the workers' compensation action its Memorandum In Opposition To Employee's Request For Hearing For Medical Treatment. (Ex.39-73). Employer argued the Industrial Commission did not possess jurisdiction to hold a hearing on the issue of medical care. ISP Minerals asserted once ALJ Lane approved the Settlement Agreement on 1-8-09, the jurisdiction of the Division and Industrial Commission over employee's Claim For Compensation was exhausted, and thus, the Industrial Commission could not acquire jurisdiction either to review the Settlement Agreement or act on employee's Request For Hearing. (Ex.39-73).

On 7-2-14, the Missouri Court of Appeals, Southern District, issued its Permanent Writ In Prohibition in Michael Alcorn's prohibition action. In its Permanent Writ, the Southern District prohibited the Honorable Sidney Pearson III from remanding the Section 287.500 action to the Industrial Commission, and ordered Judge Pearson to vacate the 5-1-14, Order And Judgment, and enter a judgment in accordance with Section 287.500. The Southern District found once a settlement agreement was approved in a workers' compensation case, the Industrial Commission's jurisdiction was exhausted, and an approved settlement was only subject to enforcement through a Section 287.500 action or garnishment proceeding. (Ex.74).

Following the issuance of the Permanent Writ In Prohibition by the Southern District, employee failed to withdraw his Request For Hearing For Medical Treatment,

which he previously filed with the Industrial Commission in the workers' compensation action on 6-6-14. (Pet.¶30).

On 7-10-14, the trial court issued an Order in the Section 287.500 action, vacating its 5-1-14, Order And Judgment, pursuant to the Southern District's Permanent Writ In Prohibition. The trial court requested counsel for employer and employee submit proposed judgments complying with Section 287.500. (Pet.¶31).

On 8-4-14, the trial court in the Section 287.500 action issued its Judgment And Order. (Ex.76-79). Therein, the trial court issued judgment in favor of Michael Alcorn and against ISP Minerals. The parties agreed the lump sum amount of \$36,508 was timely paid. ISP Minerals was to provide Michael Alcorn future related pulmonary medical care. Dr. Joseph Ojile was to provide monitoring care of occupational chemical dust-induced COPD and bronchial reactivity with obstructive airway, as described in the Settlement Agreement in the workers' compensation action. (Ex.76-79).

On 8-14-14, Respondent Industrial Commission issued its Order in the workers' compensation action, remanding the Claim to the Division to hear the parties' evidence regarding the medical treatment in issue and ISP Minerals' obligation, if any, to provide such treatment to employee. (Ex.80-85). The Division was to forward the transcript of hearing to the Industrial Commission. On receipt of the transcript, the Industrial Commission would permit employer and employee an opportunity to file briefs in support of their positions regarding the merits and the Commission's authority to determine the issue. In its 8-14-14 Order, Respondent found it possessed jurisdiction to rule on the issue of future medical care, despite the fact ALJ Lane approved the

Settlement Agreement on 1-8-09. Specifically, the Industrial Commission found it had authority to determine the necessity and reasonableness of requested medical care and whether such medical care was causally related to and flowed from the work injury in regard to the approved Settlement Agreement, based in part on employer's promise in Paragraph 6 of the Settlement Agreement to provide future medical care, and pursuant to Section 287.390.1. (Ex.80-85).

On 9-2-14, ISP Minerals filed a Petition In Prohibition/Alternative Petition In Mandamus against Respondent Industrial Commission in the Missouri Court of Appeals, Western District (W.D.77889). In its Petition, ISP Minerals alleged Respondent acted without jurisdiction or in excess of its jurisdiction in finding it possessed authority to determine whether employer was obligated to provide medical care to employee under the approved Settlement Agreement, and remanding the Claim to the Division for an evidentiary hearing on the issue of future medical care. The Western District denied ISP Minerals' Petition In Prohibition/Alternative Petition In Mandamus on 9-2-14. (Ex.86-106).

On 9-23-14, Relator ISP Minerals filed in the instant Court its Petition In Prohibition/Alternative Petition In Mandamus. In its Petition, ISP Minerals averred Respondent Industrial Commission acted without jurisdiction or in excess of its jurisdiction in finding it possessed authority to review the approved Settlement Agreement, determine the necessity and reasonableness of the medical care employee requested and employer's obligation to provide such treatment under the Settlement Agreement, and in remanding the Claim to the Division for an evidentiary hearing on the



issue of medical care. Relator asserted no provision of the Workers' Compensation Act, including Section 287.390 regarding compromise settlements of compensation claims, conferred jurisdiction on the Industrial Commission to review an approved workers' compensation settlement or to remand a claim for compensation, previously compromised by the parties under an approved settlement agreement, to the Division to hold an evidentiary hearing regarding the rights and obligations of the parties under the settlement agreement. ISP Minerals contended when ALJ Lane approved the Settlement Agreement on 1-8-09, the jurisdiction of the Division and Industrial Commission over the Claim For Compensation was exhausted, and the Claim was at an end, insofar as the Division or Industrial Commission were concerned. (Pet.¶¶1-43).

On 10-28-14, the Court issued its Preliminary Writ Of Prohibition. Therein, the Court directed Respondent to file a written return to Relator's Petition In Prohibition/Alternative Petition In Mandamus on or before 11-27-14, and show cause why a writ of prohibition should not issue, prohibiting the Industrial Commission from doing anything other than vacating the 8-14-14 Order, asserting jurisdiction in the workers' compensation action. The Industrial Commission was to take no further action on the Claim For Compensation, until further order of the Court.

On 11-26-14, Respondent Industrial Commission filed its Answer to the Petition In Prohibition/Alternative Petition In Mandamus. Therein, Respondent argued it retained authority and jurisdiction to determine if ISP Minerals was providing medical care for employee's pulmonary condition pursuant to the Settlement Agreement. Specifically, Respondent contended it had authority and jurisdiction under the Workers' Compensation



Act to resolve disputes regarding the types of treatment and medical causation when future medical care was left open in a Settlement Agreement in a workers' compensation action, and Section 287.390 conferred such jurisdiction.

### **STANDARD OF REVIEW**

The Court's review of the Industrial Commission's 8-14-14 Order will be governed by Section 287.495 of the Workers' Compensation Act. Under Section 287.495, the Court may make its Preliminary Writ Of Prohibition absolute if it finds the Industrial Commission acted without or in excess of its jurisdiction under the Workers' Compensation Act in issuing the 8-14-14 Order. **RSMo §287.495.1; *Hampton v. Big Boy Steel Erection*, 121 S.W.3d 220,222 (Mo.banc.2003).**

Questions of law are given *de novo* review. ***Dubose v. City of St. Louis*, 210 S.W.3d 391,394 (Mo.App.E.D.2006).** The Court is not bound by the Industrial Commission's application of the law, and no deference is afforded to Respondent's interpretation of the law. ***Id.*** The issues before the Court, whether the Industrial Commission acted in excess of its jurisdiction in finding it possessed authority to review the approved Settlement Agreement, remand the Claim to the Division for an evidentiary hearing, and determine whether employer was obligated, pursuant to Paragraph 6 of the Settlement Agreement, to provide employee with future medical care, are questions of law. ***Id.***

**POINTS RELIED ON**

**I.**

**THE SUPREME COURT MUST MAKE ITS PRELIMINARY WRIT OF PROHIBITION ABSOLUTE, FOR THE REASONS THAT:**

**A.**

**RESPONDENT INDUSTRIAL COMMISSION ACTED WITHOUT AND IN EXCESS OF ITS JURISDICTION UNDER THE WORKERS' COMPENSATION ACT IN FINDING IT POSSESSED JURISDICTION TO REVIEW THE APPROVED SETTLEMENT AGREEMENT AND DETERMINE THE RIGHTS AND OBLIGATIONS OF THE PARTIES THEREUNDER, AND IN REMANDING THE CLAIM FOR COMPENSATION TO THE DIVISION FOR AN EVIDENTIARY HEARING ON THE ISSUE OF MEDICAL CARE, SINCE ONCE ALJ LANE APPROVED THE SETTLEMENT AGREEMENT, THE JURISDICTION OF THE DIVISION AND INDUSTRIAL COMMISSION WAS EXHAUSTED AND AT AN END, AND THE INDUSTRIAL COMMISSION DID NOT POSSESS JURISDICTION OR AUTHORITY TO REVIEW OR OTHERWISE ACT ON THE SETTLEMENT AGREEMENT, THE CLAIM FOR COMPENSATION, OR EMPLOYEE'S REQUEST FOR HEARING; AND NO PROVISION OF THE WORKERS' COMPENSATION ACT, INCLUDING SECTION 287.390 RELIED ON BY RESPONDENT IN ITS 8-14-14 ORDER, CONFERS JURISDICTION ON THE INDUSTRIAL COMMISSION TO REVIEW OR ENFORCE AN APPROVED SETTLEMENT AGREEMENT, OR**

REMAND A CLAIM PREVIOUSLY COMPROMISED BY AN APPROVED SETTLEMENT AGREEMENT TO THE DIVISION FOR AN EVIDENTIARY HEARING REGARDING THE OBLIGATIONS OF THE PARTIES TO THAT SETTLEMENT AGREEMENT.

**B.**

THE AUTHORITIES RESPONDENT RELIED ON IN ISSUING ITS 8-14-14 ORDER DO NOT CONFER JURISDICTION ON THE INDUSTRIAL COMMISSION TO REVIEW THE APPROVED SETTLEMENT AGREEMENT, DETERMINE THE RIGHTS AND OBLIGATIONS OF THE PARTIES TO THE SETTLEMENT AGREEMENT, OR REMAND THE CLAIM FOR COMPENSATION TO THE DIVISION FOR AN EVIDENTIARY HEARING.

**C.**

RELATOR ISP MINERALS HAS NO ADEQUATE REMEDY TO CHALLENGE RESPONDENT INDUSTRIAL COMMISSION'S 8-14-14 ORDER BY APPEAL OR OTHERWISE; AND ABSENT THE ISSUANCE OF AN ABSOLUTE WRIT OF PROHIBITION BY THIS COURT, RELATOR WILL SUFFER IMMEDIATE AND IRREPARABLE INJURY.

*Shockley v. Laclede Electric Cooperative*, 825 S.W.2d 44 (Mo.App.S.D.1992);

*Mosier v. St. Joseph Lead*, 205 S.W.2d 227 (Mo.App.E.D.1937);

*Derby v. Jackson County Missouri Circuit Court*, 141 S.W.3d 413 (Mo.App.W.D. 2004);

*Meinczinger v. Harrah's Casino*, 367 S.W.3d 666 (Mo.App.E.D.2012).

## **ARGUMENT**

### **I.**

**THE SUPREME COURT MUST MAKE ITS PRELIMINARY WRIT OF PROHIBITION ABSOLUTE, FOR THE REASONS THAT:**

### **A.**

**RESPONDENT INDUSTRIAL COMMISSION ACTED WITHOUT AND IN EXCESS OF ITS JURISDICTION UNDER THE WORKERS' COMPENSATION ACT IN FINDING IT POSSESSED JURISDICTION TO REVIEW THE APPROVED SETTLEMENT AGREEMENT AND DETERMINE THE RIGHTS AND OBLIGATIONS OF THE PARTIES THEREUNDER, AND IN REMANDING THE CLAIM FOR COMPENSATION TO THE DIVISION FOR AN EVIDENTIARY HEARING ON THE ISSUE OF MEDICAL CARE, SINCE ONCE ALJ LANE APPROVED THE SETTLEMENT AGREEMENT, THE JURISDICTION OF THE DIVISION AND INDUSTRIAL COMMISSION WAS EXHAUSTED AND AT AN END, AND THE INDUSTRIAL COMMISSION DID NOT POSSESS JURISDICTION OR AUTHORITY TO REVIEW OR OTHERWISE ACT ON THE SETTLEMENT AGREEMENT, THE CLAIM FOR COMPENSATION, OR EMPLOYEE'S REQUEST FOR HEARING; AND NO PROVISION OF THE WORKERS' COMPENSATION ACT, INCLUDING SECTION 287.390 RELIED ON BY RESPONDENT IN ITS 8-14-14 ORDER, CONFERS JURISDICTION ON THE INDUSTRIAL COMMISSION TO REVIEW OR ENFORCE AN APPROVED SETTLEMENT AGREEMENT, OR**

**REMAND A CLAIM PREVIOUSLY COMPROMISED BY AN APPROVED SETTLEMENT AGREEMENT TO THE DIVISION FOR AN EVIDENTIARY HEARING REGARDING THE OBLIGATIONS OF THE PARTIES TO THAT SETTLEMENT AGREEMENT.**

**Introduction**

At issue herein is the jurisdiction of Respondent Industrial Commission. Specifically, does the Industrial Commission possess jurisdiction to review a settlement agreement in a workers' compensation action and determine the rights and obligations of the parties to that settlement agreement, following its approval by an administrative law judge? What, if anything, is the effect of an employer's promise in a settlement agreement, to provide employee with future medical care?

Neither Section 287.390, nor any other provision of the Workers' Compensation Act, confers jurisdiction on the Industrial Commission to review an approved settlement agreement, determine the meaning of the language contained in that settlement agreement and the parties' rights and obligations thereunder, order an evidentiary hearing to be undertaken by it or the Division to determine medical disputes between the parties to the settlement agreement, or enforce a settlement agreement. That an employer promises to leave future medical care open does not alter this fact. Moreover, decades of Missouri caselaw consistently hold once an ALJ or the Industrial Commission approves a workers' compensation settlement, the jurisdiction and statutory authority of the Division and Industrial Commission over the claim, and concomitantly, the settlement agreement, is



exhausted, and neither the Division nor the Industrial Commission possesses the power to review or enforce an approved settlement agreement.

In issuing its 8-14-14 Order, finding it had jurisdiction to review the Settlement Agreement entered into between Michael Alcorn and ISP Minerals, which ALJ Lane approved on 1-8-09, remand the Claim to the Division for an evidentiary hearing regarding medical treatment, and determine, once the evidentiary hearing was held, the scope of employer's obligation, pursuant to Paragraph 6 of the Settlement Agreement, to provide employee with future medical care, the Industrial Commission acted without and in excess of its jurisdiction, since its action was entirely without authority in the Act, and contrary to longstanding Missouri caselaw applying and construing Section 287.390. Accordingly, the Court must make its Preliminary Writ Of Prohibition absolute.

### **Nature of the Remedy of Prohibition**

The issuance of a Preliminary Writ Of Prohibition, barring Respondent Industrial Commission from enforcing its 8-14-14 Order was appropriate, since the Industrial Commission acted without and in excess of its jurisdiction in issuing that Order.

Prohibition is an appropriate remedy with which to address the Industrial Commission's 8-14-14 Order, since that remedy exists to restrain agencies from acting in excess of their jurisdiction. Prohibition is an independent action to prevent judicial or administrative proceedings, which lack jurisdiction. *State ex rel McCullough v. Schiff*, 852 S.W.2d 392,393 (Mo.App.E.D.1993). Agencies and commissions which exercise quasi-judicial functions may be restrained from acting in excess of their jurisdiction by means of a writ of prohibition. *State ex rel. Birdsong v. Adolf*, 724 S.W.2d 731,732

(Mo.App.E.D.1987) (prohibition is a means to prevent usurpation of judicial power, to confine inferior courts and agencies to their proper jurisdiction, and prevent them from acting in excess of their jurisdiction). Moreover, prohibition is appropriate to undo acts done in excess of a court or administrative agency's jurisdiction, so long as part of the court or agency's duties remain to be performed. *Birdsong*, 724 S.W.2d at 733. Prohibition will lie to restrain further enforcement of orders which are beyond or in excess of the authority of a court or administrative agency. *State ex rel. Munn v. McKelvey*, 733 S.W.2d 765,771 (Mo.banc.1987).

The essential function of prohibition is to prevent inferior courts or agencies from acting without or in excess of their jurisdiction. *State ex rel. Womack v. Rolf*, 73 S.W.3d 634,636 (Mo.banc.2005). A writ of prohibition will issue: 1) where there is usurpation of judicial power because a court or administrative agency lacks either personal or subject matter jurisdiction; 2) to remedy an excess of jurisdiction or an abuse of discretion, such that the court or administrative agency lacked the power to act as contemplated; or 3) where there is no adequate remedy by way of appeal, and irreparable harm will come to a litigant, if justiciable relief is not made available to respond to the court or agency's order. *State ex rel. Chassing v. Mummert*, 887 S.W.2d 573,577 (Mo.banc.1994); *State ex rel. Bennett v. Rabens*, 258 S.W.3d 929,930 (Mo.App.W.D.2008). Where unnecessary, inconvenient, and expensive litigation can be avoided, prohibition is the appropriate remedy. *State ex rel. Anheuser-Busch v. Mummert*, 887 S.W.2d 736,737 (Mo.App.E.D.1994). The authority of the court to issue a writ of prohibition is exercised when the facts and circumstances of a particular case demonstrate there exists an extreme

need for preventative action. *State ex rel. Premier Marketing v. Kramer*, 2 S.W.3d 118,121 (Mo.App.W.D.1999).

Jurisdiction concerns the right, power, and the authority of a court or administrative agency to act. *Schneider v. Feeder's Grain and Supply*, 24 S.W.3d 739,741 (Mo.App.E.D.2000). The concept of jurisdiction includes the authority or power to act in certain ways, i.e., to make certain orders or awards. *Ringiesen v. Insulation Services*, 539 S.W.2d 621,625 (Mo.App.E.D.1976). Subject matter jurisdiction is the authority of a court or agency to render a judgment or order in a particular category of case. *JCW v. Wyciskalla*, 277 S.W.3d 249,253 (Mo.banc.2009). If an administrative agency lacks statutory power, it is without subject matter jurisdiction to act. *Carr v. N. K.C. Beverage*, 49 S.W.3d 205,207 (Mo.App.W.D.2001).

### **Jurisdiction of the Industrial Commission**

Workers' compensation is not supplemental or declaratory of any existing rule, right or remedy, but creates an entirely new right or remedy, which is wholly substitutional in character, and supplants all other rights and remedies where employer and employee have elected to accept the Act, or are subject thereto by operation of law. *Sheets v. Hill Brothers Distributors*, 379 S.W.2d 514,516 (Mo.1964). All remedies, claims, or rights accruing to an employee against an employer for compensation for injury arising out of and in the course of employment are those provided for in the Act, to the exclusion of any common law or contractual rights. *Id.*

Section 287.120 of the Workers' Compensation Act provides the rights and remedies granted to an employee under the Act are exclusive, and preclude all common-law remedies. **RSMo §287.120.1.** The Workers' Compensation Act is entirely a creature of statute. *Hayes v. Show Me Believers*, 192 S.W.3d 706,707 (Mo.banc.2006). The Act is a complete code, governing all questions of substantive rights under its terms. *State ex rel. Melbourne Hotel v. Hostetter*, 126 S.W.2d 1189,1192 (Mo.banc.1939). The rights of the parties under the Workers' Compensation Act, and the manner of procedure thereunder, must be determined by the provisions of the Act. *Kristanik v. Chevrolet Motors*, 41 S.W.2d 911,912 (Mo.App.E.D.1931).

As an administrative tribunal, the Industrial Commission is a creature of statute. It exercises only that authority invested in it by legislative enactment. *Carr*, 49 S.W.3d at 207. Like all administrative bodies, the Industrial Commission possesses only such jurisdiction as is conferred on it by statute. *Sopido v. University Copiers*, 23 S.W.3d 807,810 (Mo.App.E.D.2000). The Division, its ALJs, and the Industrial Commission can only do those things, and make those orders, which the Workers' Compensation Act, or rules or regulations promulgated under the Act, authorize. *Ringiesen*, 539 S.W.2d at 62. The Industrial Commission must find authority to make orders or awards in the Act. *State ex rel. Lakeman v. Siedlik*, 872 S.W.2d 503,505 (Mo.App.W.D.1994). It may act only in accordance with applicable statutes, and may only order payments as provided for by those statutes. *Reese v. Coleman*, 990 S.W.2d 195,201 (Mo.App.S.D.1999). The Industrial Commission possesses no authority, other than that which is granted to it by the Act. *Carr*, 49 S.W.3d at 207. Section 286.060.1(3) states the Industrial Commission



shall have all powers, duties, and responsibilities conferred or imposed on it by the Act.  
**RSMo §286.060.1(3).**

### **Construction of the Workers' Compensation Act**

Since employee was injured in October 2005, the Act, as amended in 2005, will govern the jurisdictional issue before the Court. Significantly, the 2005 amendments to the Workers' Compensation Act eliminated the requirement of liberal construction. *Robinson v. Hooker*, 323 S.W.3d 418,423 (Mo.App.W.D.2010). As amended, Section 287.800.1 states ALJs, the Division and Industrial Commission "shall construe the provisions of this chapter strictly." **RSMo §287.800.1.** Strict construction of a statute presumes nothing which is not expressed therein. *Robinson*, 323 S.W.3d at 423. The rule of strict construction means everything shall be excluded from operation of a statute which does not clearly fall within the scope of the language used. *Id.* Strict construction confines the operation of a statute to matters affirmatively pointed out by its terms, and to cases which fall fairly within its letter. *Id.* The clear, plain, obvious and natural import of the language must be used. *Id.* The statute should not be applied to situations or parties not falling clearly within its provisions. *Alcorn v. Tap Enter.*, 277 S.W.3d 823,828 (Mo.App.S.D.2009). The statute can be given no broader application than is warranted by its plain and unambiguous terms. *Robinson*, 323 S.W.3d at 423.

When interpreting the Workers' Compensation Act, the Court must ascertain the intent of the legislature by considering the plain and ordinary meaning of the terms and, if possible, give effect to that intent. *Hayes*, 192 S.W.3d at 707. Provisions of a legislative

act, such as the workers' compensation law, must be construed consistently and harmoniously, to give effect to the entire statute. *Willcut v. Innovative Warehousing*, 247 S.W.3d 1,5 (Mo.App.E.D.2008). When considering the meaning of language in the Act, the words must be considered in context, and its provisions must be construed together, in pari materia, to arrive at the true meaning and scope of the statute. *Willcut*, 247 S.W.3d at 8-9. To discern the statute's purpose, its context within the overall scheme established by the legislature for adjudicating workers' compensation claims must be considered. *Fisher v. Waste Management*, 58 S.W.3d 523,526 (Mo.banc.2001).

#### **Settlements Under Section 287.390**

An employer and employee are authorized to compromise and settle a compensation claim pursuant to Section 287.390 of the Act. *Strange v. SCI Business Products*, 17 S.W.3d 171,173 (Mo.App.E.D.2000). Section 287.390 states:

“Parties to claims hereunder may enter into voluntary agreements in settlement thereof, but no agreement by an employee or his or her dependents to waive his or her rights under this chapter shall be valid, nor shall any agreement of settlement or compromise of any dispute or claim for compensation under this chapter be valid until approved by an administrative law judge or the commission, nor shall an administrative law judge or the commission approve any settlement which is not in accordance with the rights of the parties as given in this chapter....An administrative law judge, or the commission, shall approve a settlement agreement as valid and enforceable as long as the settlement agreement is not the result



of undue influence or fraud, the employee fully understands his or her rights and benefits, and voluntarily agrees to accept the terms of the agreement.” **RSMo §287.390.1.**

Industrial Commission regulations address settlements of compensation claims. Those regulations state a compromise settlement will be approved pursuant to Sections 287.390 and 287.616, unless in the opinion of the ALJ, the settlement is not in accordance with the rights of the parties. 8 **CSR 50-2.010(18)(C).**

The policy of the Act is to encourage settlements of claims for compensation benefits. *Mosier v. St. Joseph Lead*, 205 S.W.2d 227,233 (Mo.App.E.D.1937). To allow the Division or Industrial Commission to review an approved settlement agreement, or order a hearing to determine the rights and obligations of the parties to a settlement agreement, would deprive settlement agreements of finality, and thereby, discourage parties to compensation claims from resolving those claims via compromise settlements. The result reached by Respondent in its 8-14-14 Order violates the policy underlying Section 287.390. *Id.*

A settlement of a claim for compensation is made by the parties and is entirely voluntary. *Shockley v. Laclede Electric Cooperative*, 825 S.W.2d 44,47 (Mo.App.S.D.1992); *Conley v. Treasurer*, 999 S.W.2d 269,274 (Mo.App.E.D.1999). Neither the Division nor Industrial Commission possesses the authority to coerce a settlement between the parties to a claim. *Shockley*, 825 S.W.2d at 47; *Seifner v. Treasurer*, 362 S.W.3d 59,65 (Mo.App.W.D.2012). Rather, the Division or Industrial Commission only have a veto power to refuse to approve a settlement should the Division

or Commission deem the settlement not in accordance with the rights of the parties under the Act. *Conley*, 999 S.W.2d at 274. The law places a duty upon the Division or Industrial Commission to either approve or disprove any settlement attempted to be made. This duty cannot be avoided. *Roth v. J.J. Brouk & Co.*, 356 S.W.3d 786,789 (Mo.App.E.D. 2011).

The approval of a settlement in a workers' compensation action by an ALJ or the Industrial Commission is a prerequisite to its validity. *Shockley*, 825 S.W.2d at 46; *McBride v. Leggett and Platt*, 990 S.W.2d 198,202 (Mo.App.S.D.1999). An alleged contract of settlement of a compensation claim which has not been approved by either an ALJ or the Industrial Commission is void and unenforceable in the courts. *McBride*, 998 S.W.2d at 202. *Sheets v. Hill Brothers Distributors* illustrates this rule. Therein, the Supreme Court held an alleged oral contract for lifetime employment made in settlement of an employee's compensation claim, which was not approved by the Division was by statute declared to be void, and for that reason, was not enforceable in circuit court. *Sheets*, 379 S.W.2d at 518.

Section 287.390 contemplates the settlement of the entire claim for compensation, and the discharge of the employer's entire liability for that claim, not the splitting of the claim into component parts, some of which are settled and released, and others left to be adjudicated. *Shockley*, 825 S.W.2d at 49. The Division or Industrial Commission must approve the settlement as a whole, or disapprove the settlement as a whole. With a settlement effectuated under Section 287.390, the entirety of the parties' respective rights and liabilities in regard to a claim are disposed of. *Id.*

Once approved by an ALJ or the Industrial Commission, the settlement of a compensation claim is conclusive and irrevocable. *Shockley*, 825 S.W.2d at 47; *Morgan v. Duncan*, 236 S.W.2d 281,284 (Mo.1950); *Burger v. Bridgestone/Firestone*, 902 S.W.2d 308,311 (Mo.App.E.D.1995). When approved, a settlement of a compensation claim is the basis of *res judicata* and estoppel by judgment. *Shockley*, 825 S.W.2d at 47. Missouri cases consistently hold once an ALJ or the Industrial Commission approves a workers' compensation settlement, the jurisdiction of the Division and Commission is exhausted, and the claim is at an end, so far as the Division and Commission are concerned. *Mosier*, 205 S.W.2d at 232; *State ex rel. Wors v. Hostetter*, 124 S.W.2d 1072,1079-1080 (Mo.1938); *Derby v. Jackson County Circuit Court*, 141 S.W.3d 413,416 (Mo.App.W.D.2004). After a settlement agreement is approved, it is not subject to review by either the Division or Industrial Commission. *Derby*, 141 S.W.3d at 417.

Employer refers the Court to *Shockley v. Laclede Electric Cooperative*, 825 S.W.2d at 48-49, which illustrates these principles. *Shockley* affirmed an Industrial Commission award, refusing to review and enforce an approved compensation settlement. After filing a claim for a 4-9-86 accident, Shockley entered into a settlement agreement with Laclede to compromise that claim. Pursuant to the settlement agreement, Shockley received a lump sum of \$25,631.27 for permanent partial disability. Significantly, the settlement agreement stated Shockley understood that, by entering into the settlement, he was forever closing out his claim and would receive no further compensation or medical aid by reason of the accident. An ALJ approved the settlement agreement between Shockley and Laclede. Thereafter, Shockley filed a first amended

claim based on the 4-9-86 accident. The Industrial Commission denied the amended claim, finding it possessed no jurisdiction to either review or enforce the settlement agreement. *Shockley* 825 S.W.2d at 45-46.

On appeal, Shockley contended the Industrial Commission erred in denying his amended claim, since the Commission's award failed to fully treat the effect of his work injury, because it did not provide for future prosthetic devices, as required by Section 287.140. Rejecting this contention, the court held the Industrial Commission correctly concluded the approved settlement agreement deprived it of jurisdiction to review the settlement and determine whether Shockley was entitled to additional treatment. A final settlement, once approved, was irrevocable and conclusive, and the order of approval was not reviewable. Any relief against the approved settlement could only be had in a court of equity on proof of fraud or mistake. It was presumed the Division or Industrial Commission performed its duty in connection with the settlement by determining if it was in accordance with the parties' rights under the Act. A settlement under Section 287.390 was not an award, which was subject to review. Rather, a settlement, once approved, was the basis of *res judicata* and estoppel by judgment. *Shockley*, 825 S.W.2d at 47.

Where an employee requested the Industrial Commission set aside a previously approved settlement, the Commission had to reject that request for lack of jurisdiction. Once the settlement was approved, the Industrial Commission's jurisdiction was exhausted. Thus, the Industrial Commission properly found it had no jurisdiction to

review the settlement agreement compromising Shockley's claim. *Shockley*, 825 S.W.2d at 47.

In his appeal, Shockley contended the Industrial Commission erred in failing to award payment of future prosthetic devices, as required by Section 287.140.7. Section 287.140.7 stated the Division or Industrial Commission could order an employer to pay for prosthetic devices, whenever the Division or Commission found an employee could be partially or wholly relieved of the effects of the work injury by the use of a prosthetic. Laclede argued by agreeing he would receive no further compensation and medical aid, Shockley was not entitled to receive further benefits, and therefore, was foreclosed from recovering prosthetic expenses. Receiving a prosthetic was part of the medical aid which Shockley gave up as part of his settlement. Even if it were not, a prosthesis was clearly a part of the compensation Shockley expressly relinquished in the settlement agreement. Thus, by entering into the settlement, which the ALJ approved, Shockley agreed he was forever closing out his claim under the Act, and would receive no further compensation or medical aid by reason of the 4-9-86 accident. *Shockley*, 825 S.W.2d at 48.

With a settlement effected under Section 287.390, the whole of the parties' respective rights and liabilities regarding the claim were disposed of once and for all, and neither the Division nor Industrial Commission could thereafter acquire jurisdiction to act. Thus, the approved settlement was a settlement of Shockley's entire claim, and a discharge of Laclede's entire liability, including liability for prosthetic expenses. *Shockley*, 825 S.W.2d at 49.



*Mosier v. St. Joseph Lead*, 205 S.W.2d at 232-233, reached a similar result. While working for St. Joseph, Mosier injured his back. St. Joseph provided treatment to Mosier and paid temporary total disability. Subsequently, Mosier secured care through Dr. Kee, a physician of his own selection. Mosier underwent multiple surgeries, and filed a compensation claim. *Mosier*, 205 S.W.2d at 229.

Thereafter, Mosier and St. Joseph entered into a settlement. Pursuant to the terms of the settlement, Mosier was to be paid a lump sum for permanent partial disability and \$250 for medical expenses. Prior to approving the settlement agreement, the Commissioner made an effort to assure himself Mosier appreciated the nature and consequences of the settlement he was making, and Mosier was aware if any further treatment was required, employer would be released from any obligation to provide such treatment, and the matter of securing and paying for additional care would be Mosier's sole responsibility. *Id.* After Mosier stated he understood the terms of the settlement, and agreed to those terms, the Commissioner approved the settlement. *Mosier*, 205 S.W.2d at 229.

After the Commissioner approved the settlement, St. Joseph tendered a check for the lump sum payment and \$250 in medical expenses to Mosier's attorney, who refused to accept the check on the ground Mosier wished to submit to additional surgery. Mosier filed a motion with the Industrial Commission, requesting an order setting aside the settlement, and granting him additional treatment. *Mosier*, 205 S.W.2d at 229-230.

In his motion, Mosier did not assert there was any misunderstanding on his part regarding the settlement, he had not fully agreed to the settlement, or the settlement had



not been lawfully approved. Rather, Mosier agreed to a final compromise settlement of his claim, but then asserted he had not accepted consideration for that settlement for the reason that, on the date of settlement, he had been unable to decide whether to submit to further surgery, and he thereafter submitted to examination by a new physician, who advised additional surgery might reasonably be expected to cure the work injury. Employer contended once the Commissioner approved the settlement, all of its obligations to Mosier arising under the claim had been fully settled, compromised, extinguished and discharged, such that St. Joseph was no longer liable to Mosier for any further payments, medical benefits, or obligations of any kind arising out of the accident. The Commissioner denied Mosier's motion, finding he was without jurisdiction. After the full Industrial Commission affirmed this ruling, Mosier appealed. *Mosier*, 205 S.W.2d at 230.

On appeal, Mosier conceded the settlement between himself and St. Joseph was effected under Section 287.390. The Commissioner entered an order, approving that settlement agreement. *Mosier*, 205 S.W.2d at 231. As to the Industrial Commission's duty in connection with a settlement, the only condition to the validity of the settlement was that it must be approved if the ALJ or Industrial Commission found it to be in accordance with the parties' rights under the Act, and such a settlement, once made and approved, was no less inviolable than any other valid agreement. It became conclusive and irrevocable upon its approval. When the settlement agreement was approved by the Commissioner, the jurisdiction of the Industrial Commission over Mosier's claim was exhausted. *Mosier*, 205 S.W.2d at 231-232.

Having satisfied himself the proposed settlement was fair and proper, the Commissioner's only authority was to enter an order approving the settlement, which he did. Since that settlement, once approved, was conclusive and irrevocable and not subject to review, the full Industrial Commission was without jurisdiction to entertain Mosier's motion to set aside the settlement or grant him further treatment. With the approved settlement, the whole of the parties' respective rights and liabilities were disposed of, and the Industrial Commission could thereafter acquire no jurisdiction to act on either Mosier's claim or the settlement agreement. *Mosier*, 205 S.W.2d at 233.

*Derby v. Jackson County Missouri Circuit Court*, 141 S.W.3d at 414-415, affirmed an Industrial Commission order, holding it lacked jurisdiction to review an approved settlement agreement in regard to an employee's request for additional treatment. While working as a process server, Derby was attacked by a dog, resulting in an ACL tear in her left knee. While recovering from the ACL tear, Derby fell, tearing ligaments in her left ankle. Derby filed a compensation claim. *Id.*

Thereafter, Derby and her employer entered into a settlement agreement, whereby employer, in exchange for its release from any further liability for Derby's work injury, agreed to pay a lump sum of \$21,831. Since Derby was morbidly obese, thereby eliminating surgery as a viable option at time of settlement, employer agreed to provide Derby with braces indefinitely, or if she became a surgical candidate within 2 years of the date of settlement, to cover the reasonable and customary charges for surgery to repair the ACL tear in Derby's left knee and torn ligaments in her left ankle. Derby agreed that by entering into the settlement, she would receive no further compensation benefits or

medical aid by reason of the accident, and employer was released from all liability for the accident on approval of the settlement agreement. *Derby*, 141 S.W.3d at 414-415.

After an ALJ approved the settlement, Derby filed a motion, seeking an enlargement of time to obtain medical treatment. In her motion, Derby sought to extend the agreed-upon two-year period for becoming a surgical candidate, set forth in the settlement. After an ALJ dismissed her motion, Derby filed an application for review with the Industrial Commission. It dismissed the application, based upon a lack of jurisdiction. The Industrial Commission found the settlement agreement finally and completely settled Derby's claim, and was not an award of benefits which was subject to Commission review. *Derby*, 141 S.W.3d at 415.

Derby appealed. On appeal, she contended the Industrial Commission erred in dismissing her application for review for lack of jurisdiction. Employer argued the Industrial Commission acted correctly in dismissing the application, since the parties' settlement agreement and the ALJ's order approving the agreement did not constitute an award of compensation benefits, which was subject to Commission review. The appellate court agreed. *Id.*

It found once approved, a settlement agreement of a compensation claim was not subject to Industrial Commission review. When a settlement was approved, the jurisdiction of the Industrial Commission was exhausted. *Id.* While conceding she entered into the settlement agreement, Derby asserted the order approving the agreement was subject to Industrial Commission review as an award of benefits. *Id.* Derby argued the settlement agreement was subject to review because it did not resolve the entire

dispute between the parties, such that her claim was left open for final determination by the ALJ after the settlement agreement was approved, since the agreement did not resolve the issue of future treatment for her left knee and ankle, in that it provided employer was to pay reasonable and customary charges for surgery, if Derby became a surgical candidate within 2 years of the settlement's execution. She claimed because the settlement agreement was left open, it was not a settlement encompassed by Section 287.390. Thus, the ALJ possessed jurisdiction to finally determine her claim, which determination would be subject to Industrial Commission review as an award of benefits.

*Id.*

Giving the language of the settlement agreement its plain and ordinary meaning, the court found it was clear the parties intended to finally and completely resolve the claim, and as part of the settlement, Derby was entitled to have surgery done on her knee and ankle, at employer's expense, if she became a surgical candidate within 2 years of signing the settlement. The word "if", contained in the settlement agreement, indicated surgery on Derby's left knee and ankle was conditional on her becoming a surgical candidate within 2 years. Nothing in the settlement agreement suggested the parties intended the ALJ review the issue of medical care at the end of the 2-year period, and then finally resolve Derby's claim. *Id.* Thus, the parties entered into a settlement agreement which resolved Derby's entire claim for compensation benefits. Since the Industrial Commission lacked jurisdiction to review an approved settlement agreement reached in accordance with Section 287.390, it was correct in dismissing Derby's application for review for lack of jurisdiction. *Id.*



*Meinczinger v. Harrah's Casino*, 367 S.W.3d 666,669 (Mo.App.E.D.2012), relied on *Shockley* in holding the Industrial Commission did not err in denying an employee's claim, where the claim sought benefits which flowed from an earlier work injury, which had been settled under Section 287.390. While employed as a slot attendant at Harrah's, Meinczinger tripped over a manhole cover, injuring her left knee. In October 2003, Meinczinger filed a claim for the 2002 injury to her left lower extremity and knee. That claim was assigned Injury Number 02-115229. On 7-16-08, Meinczinger filed another claim, which was assigned Injury Number 07-133762. In the 2007 claim, Meinczinger alleged because of the 2002 injury to her left knee, she compensated by placing stress on her right knee and left hip, causing injury to the same. *Meinczinger*, 367 S.W.3d at 667.

On 10-29-08, Meinczinger and Harrah's entered into a settlement on the 2002 claim. The settlement agreement stated the parties agreed to enter into a compromise settlement for payment of a lump sum of \$27,206, based on an approximate disability of 50% of the left knee. *Id.* Further, the settlement stated Meinczinger understood she was forever closing out her 2002 claim under the Act; she would receive no further compensation or medical aid by reason of the 2002 accident; and Harrah's was released from all liability for the accident on approval by the ALJ. An ALJ approved the settlement of the 2002 claim on 10-29-08. In May 2009, Meinczinger filed an amended claim for the 2007 injury, alleging she received that injury while undergoing physical therapy for the 2002 knee injury. *Id.*

An ALJ held a hearing on the 2007 claim to determine whether the Division possessed jurisdiction over the claim. Harrah's acknowledged Meinczinger sustained the

2007 injury during PT for her 2002 injury. Claimant so testified in her deposition. The ALJ issued an award, denying benefits for the 2007 injury. In her rulings of law, the ALJ concluded she had jurisdiction over the 2007 claim, but denied benefits because Meinczinger was not employed by Harrah's, and was not in the course and scope of employment in August 2007, when her injury occurred. The August 2007 injury flowed from the 2002 injury, which was settled in October 2008, and the Division no longer possessed jurisdiction over the 2002 injury, or the settlement for that injury. *Meinczinger*, 367 S.W.3d at 667-668.

On review, the Industrial Commission entered an award, denying compensation, affirming the ALJ's award. The Industrial Commission found Meinczinger filed her original claim for the 2007 injury while her claim for the 2002 injury remained open. Meinczinger's theory of recovery was the 2007 injury flowed as a natural consequence of the 2002 injury. The Industrial Commission concluded the primary injury occurred in 2002; Meinczinger should have filed an amended claim on the 2002 injury; employee had the opportunity to amend her claim for that injury because it was still open in August 2007, when employee allegedly injured her right knee and hip; Meinczinger, instead, filed a separate claim for the 2007 injury which was only compensable by relating back to the 2002 injury; and she fully settled the 2002 injury, without accounting for the 2007 injury in the settlement. The Industrial Commission denied the 2007, claim because it was based on an injury which flowed as a natural consequence of the 2002 injury, which had been compromised by an approved settlement. *Meinczinger*, 367 S.W.3d at 668.



When the settlement of the 2002 claim was approved, the jurisdiction of the Industrial Commission was exhausted, and the matter was at an end, so far as the Commission was concerned. The Industrial Commission did not have jurisdiction over Meinczinger's 2002 injury, because it was settled. It had no authority to award additional benefits for a claim over which it possessed no jurisdiction. Thus, the Industrial Commission denied Meinczinger's 2007 claim. *Id.*

Meinczinger appealed, and the appellate court affirmed. On appeal, Meinczinger asserted the Industrial Commission erred when it denied the 2007 claim for lack of jurisdiction, because even though she settled the claim for the 2002 injury while the claim for the 2007 injury was still pending, the settlement of the claim for the 2002 injury did not destroy the Commission's jurisdiction over the claim for the 2007 injury. Rejecting this contention, the court found the Industrial Commission lost jurisdiction over the 2002 injury, and all injuries flowing as a natural consequence of that injury, because the parties entered into a settlement agreement approved by an ALJ, which closed out all claims stemming from the 2002 injury. *Id.*

When the ALJ approved the settlement agreement, it was no longer subject to Industrial Commission review. The order approving a workers' compensation settlement was conclusive and irrevocable. An approved settlement agreement exhausted the jurisdiction of the Industrial Commission. This was because Section 287.390 contemplated the settlement of the entire claim and the discharge of an employer's entire liability. *Meinczinger*, 367 S.W.3d at 669.

Meinczinger's 2007 injury was sustained during PT for her 2002 injury. Injuries sustained during authorized medical care for a prior compensable injury were a natural and probable consequence of that injury. When the ALJ approved the parties' settlement for the 2002 injury, the Industrial Commission lost jurisdiction over that injury, and all subsequent injuries flowing from it, including the 2007 injury. Consequently, the Industrial Commission did not err in concluding it did not possess jurisdiction over Meinczinger's claim, seeking benefits for the 2002 injury. *Id.*

In 2005, the Missouri legislature made significant changes to the Workers' Compensation Act, amending some 30 sections thereof. *MARA v. Department of Labor and Industrial Relations*, 277 S.W.3d 670,674 (Mo.banc.2009). Amongst those changes were amendments to the language in Section 287.390. When the legislature amended Section 287.390, it was presumed to be aware of existing case precedent, such as *Shockley*, 825 S.W.2d at 47-48, and *Mosier*, 205 S.W.2d at 232, ruling that when a workers' compensation settlement was approved by an ALJ or the Industrial Commission, the jurisdiction of the Division and Industrial Commission over the claim was exhausted, and the matter was at an end, so far as the Division and Commission were concerned. *Greenbriar v. Director of Revenue*, 47 S.W.3d 346,352 (Mo.banc.2009).

Despite its awareness of this longstanding case precedent, in 2005, the legislature did not add any language to Section 287.390, stating the Division and/or Industrial Commission possessed jurisdiction to review or enforce an approved settlement agreement, or to hold additional proceedings on a claim, including an evidentiary hearing on disputed factual issues between parties to the claim, after an ALJ or the Industrial

Commission approved a settlement agreement compromising the claim. **RSMo** §287.390. The failure of the legislature to include such language in Section 287.390 when amending that statutory provision in 2005 is evidence that it was not the legislature's intent to confer jurisdiction on the Division or Industrial Commission to review or enforce an approved settlement agreement, or to hold further proceedings on a claim after a settlement agreement resolving the claim had been approved by an ALJ or the Commission. *Frazier v. Treasurer*, 869 S.W.2d 152,157 (Mo.App.E.D.1993).

### **Respondent Acted In Excess Of His Jurisdiction**

Once ALJ Lane approved the Settlement Agreement on 1-8-09, the jurisdiction of the Division, and that of the Industrial Commission, over employee's Claim For Compensation was exhausted. The Claim For Compensation was at an end, so far as the Division and Industrial Commission were concerned. *Mosier*, 205 S.W.2d at 232-233; *Shockley*, 825 S.W.2d at 47; *Derby*, 141 S.W.3d at 416-417; *Meinczinger*, 367 S.W.3d at 669. With an approved settlement effected on the Claim For Compensation, the whole of the employer and employee's rights and liabilities as to the subject matter of the Claim were disposed of, once and for all, by the Division and Industrial Commission. Consequently, the Industrial Commission did not possess jurisdiction to review or enforce the Settlement Agreement, act on employee's request for a hearing on medical care, or remand the Claim For Compensation to the Division for an evidentiary hearing. *Id.*

In finding it possessed jurisdiction to review the approved Settlement Agreement, rule on the issue of medical care and order the Division to hold an evidentiary hearing on

that issue, Respondent Industrial Commission acted without jurisdiction and in excess of the jurisdiction conferred on it by the Workers' Compensation Act. *Id.* No provision of the Act, including Section 287.390 relied on by Respondent in its 8-14-14 Order, confers jurisdiction on the Industrial Commission to review or enforce an approved workers' compensation settlement, or to remand a claim for compensation, previously compromised by the parties under an approved settlement agreement, to the Division for it to hold an evidentiary hearing regarding the rights and obligations of the parties to that settlement agreement. **RSMo §287.390; Mosier**, 205 S.W.2d at 232-233; **Shockley**, 825 S.W.2d at 47.

Once ALJ Lane approved the Settlement Agreement on 1-8-09, *res judicata* and estoppel by judgment barred employee from seeking additional workers' compensation benefits on the Claim, including medical treatment other than that which was expressly agreed to by the parties in Paragraph 6 of the Settlement Agreement (medical monitoring care), and which employer had previously provided, and continued to provide to employee. **Shockley**, 825 S.W.2d at 47; **Wors**, 124 S.W.2d at 1079-1080. Since the Industrial Commission did not possess jurisdiction over either the Claim For Compensation or the approved Settlement Agreement, Respondent's 8-14-14 Order, concluding the Industrial Commission had authority to rule on the issue of future medical care, and remanding the Claim to the Division to hold an evidentiary hearing on that issue was void, and of no force or effect. **Shockley**, 825 S.W.2d at 47. The Industrial Commission lacked the statutory power to act as it did in its 8-14-14 Order. In issuing the 8-14-14 Order, finding it possessed authority to review the approved Settlement



Agreement and determine the rights and obligations of the parties thereto as to medical care, and in remanding the Claim to the Division to hold an evidentiary hearing, Respondent acted without and in excess of its subject matter jurisdiction. *Carr*, 49 S.W.3d at 207.

The Industrial Commission was barred from remanding the Claim to the Division for further proceedings, and the Division is precluded from holding an evidentiary hearing on the issue of medical care, as Respondent directed in its 8-14-14 Order. *Shockley*, 825 S.W.2d at 48-49. In remanding the Claim to the Division, and directing the Division to hold an evidentiary hearing regarding employer's obligation under the Settlement Agreement to provide employee with future medical care, the Industrial Commission acted without jurisdiction and in excess of its jurisdiction and statutory authority under the Workers' Compensation Act. *Shockley*, 825 S.W.2d at 48-49; *Mosier*, 205 S.W.2d at 232; *Wors*, 124 S.W.2d at 1079-1080.

### **The Settlement Agreement Contained No Reservation**

#### **As To Future Proceedings On Medical Care**

The law presumes a settlement agreement is valid. *Andes v. Albano*, 853 S.W.2d 936,940 (Mo.banc.1993). Since an agreement to settle is a species of contract, it is governed by contract law. *Promotional Consultants v. Logston*, 25 S.W.3d 501,503 (Mo.App.E.D.2001). Interpretation of a settlement agreement is governed by the same principles applicable to other contractual agreements. *Andes*, 853 S.W.2d at 940. The court must determine the scope of a settlement agreement by the intent of the parties, ascertained from the language used, and the circumstances surrounding the settlement.



*Promotional Consultants*, 25 S.W.3d at 505; *Slankard v. Thomas*, 992 S.W.2d 619,624 (Mo.App.S.D.1995).

When the language of a settlement agreement is plain and unambiguous on its face, the intent of the parties is to be governed by the agreement. *Promotional Consultants*, 25 S.W.3d at 505. Language contained in a settlement agreement which is unambiguous must be given its full effect, within the context of the agreement. *Slankard*, 912 S.W.2d at 624. Any reservation or limitation as to the scope of a settlement agreement must be clearly expressed. *Promotional Consultants*, 25 S.W.3d at 505. A party who enters into a settlement agreement retains certain legal rights to the dispute only where there is an express reservation of such rights in the settlement agreement. *Sexton v. First National Mercantile Bank and Trust*, 713 S.W.2d 30,31 (Mo.App.S.D.1986).

The Settlement Agreement entered into between Michael Alcorn and ISP Minerals, which ALJ Lane approved on 1-8-09, contained no limitations or reservations. (Ex.4-5). Absent in the Settlement Agreement was any language, stating that by entering into the settlement, employee was not waiving any right to seek new or additional forms of medical care or treatment for his work-related pulmonary injury, other than the medical monitoring care explicitly provided for in Paragraph 6 of the Agreement. Nor did the Settlement Agreement indicate employee was not waiving any right he might possess to have any future issue or dispute as to employer's obligation to provide medical care for his work-related pulmonary condition, and the extent of that obligation, resolved by the Division or Industrial Commission, through additional proceedings on the Claim,

including an evidentiary hearing of the nature contemplated by Respondent in its 8-14-14 Order. Rather, the clear and unambiguous language of the Settlement Agreement stated employee understood that by entering into the Settlement Agreement, he was forever closing out his Claim under the Act; he would receive no further compensation benefits or medical aid by reason of the accident/occupational disease; employee had the right to a hearing of his Claim, which might result in employee receiving more or less money than was agreed to in the settlement; and employer was released from all liability for the accident/occupational disease on approval by the ALJ. (Ex.4-5).

Since the language of the Settlement Agreement was clear and unambiguous, the Court must enforce the Settlement as written. *Andes*, 853 S.W.2d at 940. As a review of the Settlement Agreement shows, employee failed to preserve any right to future medical care, other than the medical monitoring care to be performed by Dr. Ojile expressly authorized in Paragraph 6, or reserve any right he might have to additional proceedings before either the Division or Industrial Commission on the issue of medical care. (Ex.4-5). Accordingly, employee waived any right he might possess to have the issue of medical treatment adjudicated by the Division or Industrial Commission, including the right to have an evidentiary hearing on that issue. *Promotional Consultants*, 25 S.W.3d at 506; *Shockley*, 825 S.W.2d at 48-49. Following ALJ Lane's approval of the Settlement Agreement on 1-8-09, the Industrial Commission was barred from remanding the Claim to the Division for further proceedings, and concomitantly, the Division was precluded from holding an evidentiary hearing on medical care. *Shockley*, 825 S.W.2d at 48-49.

### **Nature Of An Action Under Section 287.500**

The Division and Industrial Commission do not possess authority to review or enforce an approved settlement agreement. *Vaughn v. County of Mississippi*, 568 S.W.2d 817,818 (Mo.App.S.D.1978); *Carr*, 49 S.W.3d at 207. Rather, only a court can enforce an approved compensation settlement, such that it has the effect of a judgment. *Baxi v. United Technologies Automotive*, 122 S.W.3d 92,96 (Mo.App.E.D.2003). The sole method for reviewing or enforcing an approved settlement agreement of a workers' compensation claim is that provided in Section 287.500. *Brown v. Color Coatings*, 867 S.W.2d 242,244 (Mo.App.S.D.1993).

Section 287.500 states any party in interest may file in the circuit court of the county in which the accident occurred a certified copy of a memorandum of agreement approved by the Division or Industrial Commission, whereupon the court shall render judgment in accordance therewith. Such judgment shall have the same effect and all proceedings in relation thereto shall thereafter be the same as though the judgment were a final judgment, which had been rendered in a suit duly heard and determined by the circuit court. **RSMo §287.500.**

Section 287.500 permits any party to a workers' compensation award or settlement to file the award or settlement in circuit court to compel enforcement of the same. That Section authorizes a circuit court to enter a judgment on a final award or settlement, as if it were an original judgment of the circuit court. *Baxi*, 122 S.W.3d at 96.

The remedy provided by Section 287.500 is limited in scope. A Section 287.500 action is not part of the proceedings to establish an employee or employer's substantive

rights or obligations. *Taylor v. St. John's Regional Health Center*, 161 S.W.3d 868,871 (Mo.App.S.D.2005). An employee's substantive rights and an employer/insurer's liability under the Act are determined by the award or settlement sought to be enforced. *Id.* Section 287.500 merely affords a method for enforcing an award or settlement. *Id.*

The authority of the circuit court is tightly circumscribed in an action brought under Section 287.500. *Brown*, 598 S.W.2d at 689. When acting under Section 287.500, the circuit court has no discretion in entering its judgment. *Id.*; *Baxi*, 122 S.W.3d at 97. The only judgment the circuit court can enter is one *in accordance with* the award or settlement agreement sought to be enforced. *Schneider*, 24 S.W.3d at 741. In providing the circuit court "shall render judgment in accordance" with the award or settlement, the legislature indicated a mandate to act. *Baxi*, 122 S.W.3d at 97. A Section 287.500 action does not involve the merits of the award or settlement, and there are no further factual issues to be resolved by the circuit court. *Id.*; *Taylor*, 161 S.W.3d at 862.

Respondent Industrial Commission did not possess authority to enforce the Settlement Agreement. *Vaughn*, 568 S.W.2d at 818; *Meinczinger*, 367 S.W.3d at 669. Rather, the sole method for enforcing the Settlement Agreement is the procedure set forth in Section 287.500. *RSMo* §287.500; *Brown*, 867 S.W.2d at 244. Employee utilized this remedy when he filed the Section 287.500 action in Iron County Circuit Court. (Ex.6-10).

A remedy exists for employee to have the Settlement Agreement construed, and to secure a declaration as to whether the Settlement Agreement, in particular Paragraph 6 thereof, obligates employer to provide employee with inhaler medications. That remedy



is the filing of a declaratory judgment action under Section 527.020, seeking to have a circuit court issue a declaration as to the rights and obligations of the parties to the Settlement Agreement, to determine whether the language of the Settlement Agreement is clear and unambiguous, requiring it to be enforced as written; and, in particular, to determine whether Paragraph 6 of the Settlement Agreement requires employer to provide employee with the inhaler medications he seeks. Likewise, employee can have these issues determined in an action for specific performance. *Precision Investments v. Cornerstone Propane*, 220 S.W.3d 301,303 (Mo.2007).

It is axiomatic that settlement agreements are species of contract. *Id.*; *Andes*, 853 S.W.2d at 940. Actions for specific performance and declaratory judgment are frequently used to construe settlement agreements, to determine whether the language in such agreements is ambiguous, and relatedly, to ascertain the rights and obligations of the parties to those agreements. See, e.g., *Precision Investments*, 220 S.W.3d at 303. The express terms of Section 287.390 do not confer on Respondent Industrial Commission the jurisdiction or statutory authority to undertake such a determination. **RSMo §287.390.**

In its 8-14-14 Order, Respondent Industrial Commission suggests the Iron County Circuit Court, sitting in the Section 287.500 action, did not possess jurisdiction to review the Settlement Agreement, determine whether the terms of the Settlement Agreement, in particular Paragraph 6 therein regarding future medical care, were ambiguous, or to resolve the factual issue of whether the inhaler medications employee sought were reasonable or necessary to cure or relieve his work-related pulmonary condition. (Ex.84). **RSMo §287.500; *Baxi***, 122 S.W.3d at 97 (when acting under Section 287.500, a circuit



court has no discretion in entering its judgment; the only judgment the circuit court can enter is one in accordance with the settlement agreement sought to be enforced). This statement, while true, misses the mark.

A Section 287.500 action does not involve the merits of the settlement agreement sought to be enforced, and the circuit court cannot resolve factual issues arising under the settlement agreement. *Id.*; *Taylor*, 161 S.W.3d at 862. However, an employee can add a count to an action brought under Section 287.500, seeking a declaratory judgment, and asking the court to determine whether the language contained in the settlement agreement at issue is ambiguous and to issue a declaration as to the rights and obligations of the parties under the settlement agreement. Section 527.020 of the Declaratory Judgment Act, which allows a circuit court to determine the rights of the parties to a written contract, expressly contemplates relief of this nature. **RSMo** §527.020. And, pursuant to Section 527.030, a contract may be construed, either before or after there has been an alleged breach thereof. **RSMo** §527.030. Section 287.500 does not bar a party to a workers' compensation settlement agreement from joining a Section 287.500 action with an action under Section 527.020 for declaratory judgment or an action for specific performance. **RSMo** §§287.390; 527.020.

Should the Court make its Preliminary Writ Of Prohibition absolute, employee Michael Alcorn has a remedy for the relief he seeks. He may file a declaratory judgment action against ISP Minerals, asking the circuit court to issue a declaration as to the rights and obligations of the parties to the Settlement Agreement, in particular the obligation of employer to provide future medical care under Paragraph 6 of the Settlement Agreement.

**RSMo** §527.020. Should employee not wish to file a declaratory judgment action, he may file an action for specific performance. *Precision Investments*, 220 S.W.3d at 303.

Since Respondent Industrial Commission acted without and in excess of its jurisdiction under the Workers' Compensation Act in issuing its 8-14-14 Order, finding it possessed authority and jurisdiction to review the approved Settlement Agreement, resolve the issue of medical treatment and remand the Claim to the Division for an evidentiary hearing, this Court must make its Preliminary Writ Of Prohibition, barring the Industrial Commission from enforcing its 8-14-14 Order, absolute. *Birdsong*, 724 S.W.2d at 733; *Munn*, 733 S.W.2d at 771. Prohibition lies to restrain enforcement of Respondent's 8-14-14 Order, since its issuance of that Order was an act without and in excess of the Industrial Commission's jurisdiction. *Id.*; *Shockley*, 825 S.W.2d at 48-49.

### B.

**THE AUTHORITIES RESPONDENT RELIED ON IN ISSUING ITS 8-14-14 ORDER DO NOT CONFER JURISDICTION ON THE INDUSTRIAL COMMISSION TO REVIEW THE APPROVED SETTLEMENT AGREEMENT, DETERMINE THE RIGHTS AND OBLIGATIONS OF THE PARTIES TO THE SETTLEMENT AGREEMENT, OR REMAND THE CLAIM FOR COMPENSATION TO THE DIVISION FOR AN EVIDENTIARY HEARING.**

In its 8-14-14 Order, Respondent noted employer asserted the general rule regarding the Industrial Commission's post-settlement authority was that after an ALJ or the Commission approved a settlement, the jurisdiction of the Division and Commission was exhausted. As Respondent observed, Relator correctly cited *Shockley v. Laclede*

*Electric* for the proposition that Section 287.390 contemplated the settlement of the entire claim and the discharge of an employer's entire liability, not the splitting of the claim into component parts, some of which were settled and released, and others left to be adjudicated by the Division or Commission. (Ex.80-85).

Respondent readily admitted its research revealed no Missouri appellate case addressing the Industrial Commission's authority to determine disputes regarding medical care in precisely the posture presented by the instant Claim. Undeterred, however, Respondent stated courts routinely held determinations regarding what medical care is due under Section 287.140 is for the administrative determination of the Division or Industrial Commission. It cited *State ex rel. Rival v. Gant*, 945 S.W.2d 475,477 (Mo.App.W.D.1997); and *State ex rel. Lester E. Cox Medical Center v. Wieland*, 895 S.W.2d 924,926 (Mo.App.S.D.1999), to support this proposition. (Ex.83). However, *Rival v. Gant*, *Lester E. Cox Medical Center v. Wieland*, and *State ex rel. Standard Register Co. v. Mummert*, 880 S.W.2d 925,926 (Mo.App.E.D.1994), on which the Industrial Commission also relied, lend no support to Respondent's conclusion it possessed jurisdiction to review the approved Settlement Agreement and rule on the issue of future medical care and the obligation of employer, if any, to provide inhaler medications to employee under Paragraph 6 of the Settlement Agreement.

At issue in *Rival v. Gant* was whether Rival discriminated against two injured employees because they retained counsel and filed compensation claims. Hess experienced upper extremity injuries after beginning work for Rival in December 1987. In February 1991, Hess hired an attorney to represent her in a compensation claim.

While working for Rival, Bird experienced injuries similar to those Hess suffered. In February 1991, Bird also hired an attorney to pursue a compensation claim. Both Bird and Hess filed suit in Jackson County Circuit Court pursuant to Section 287.780 of the Workers' Compensation Act. In count one of the petition, Hess claimed Rival discriminated against her from June 1991 to October 1994, when she reached a settlement of her claim with Rival. In count two of the petition, Bird asserted Rival discriminated against her from June 1991 to August 1993, when she settled her claim with that employer. *Rival*, 943 S.W.2d at 476.

Both plaintiffs alleged they retained attorneys in February 1991 and Rival terminated their TTD benefits and medical treatment and stopped paying mileage expenses from June 1991, until their final settlements were accomplished. Additionally, Hess and Bird averred they were subjected to verbal criticism and hostile attitudes at Rival. Plaintiffs contended termination of their benefits was discriminatory, as defined by Section 287.780, and thus, the circuit court had jurisdiction over their action. Significantly, the petition against Rival did not allege any discriminatory employment action by it, such as transfer, suspension, or discharge based exclusively on plaintiffs' exercise of their rights under the Act, or an action such as denying plaintiffs' advancement, salary or hourly pay increases, or assignment to a less desirable job. Rival filed a motion to dismiss, asserting the circuit court lacked subject matter jurisdiction, because the allegations in the petition fell within the exclusive jurisdiction of the Act. After the trial court denied the motion to dismiss, Rival sought and obtained a preliminary writ of prohibition. *Id.*



The appellate court made its preliminary writ of prohibition absolute, and directed the trial court to dismiss the lawsuit for lack of subject matter jurisdiction. At issue was whether plaintiffs' allegations satisfied the subject matter jurisdiction requirements set forth in the Act. Under Section 287.120.1, an employer was released from all other liability whatsoever, and the rights and remedies granted to an employee under the Act excluded all other rights and remedies of the employee. However, Section 287.780 provided no employer shall discharge or in any way discriminate against any employee for exercising his or her rights under the Act. Any employee who had been discharged or discriminated against had a civil action for damages against his or her employer. Thus, Section 287.780 created an independent tort. *Rival*, 945 S.W.2d at 476-477.

Under the Act, an employer was required to furnish such medical treatment as was necessary to cure or relieve the effects of the injury. This included Rival's obligation to advance or reimburse mileage expenses in certain situations. Section 287.170 required payment of temporary total disability. Relying on *Standard Register v. Mummert*, the court found the determination of what sort of care as may necessarily be rendered to an employee fell within the exclusive province of the Division. *Rival*, 945 S.W.2d at 477.

If there was a termination of benefits, as plaintiffs argued, they could request their claims be advanced on the docket and set for immediate hearing on the grounds of hardship. Thus, if Rival terminated medical treatment, TTD and mileage expenses, Bird and Hess had recourse within the Division under the Act. *Id.* Hess and Bird's conclusory allegations were insufficient to state a claim for relief under Section 287.780.



The Western District directed the trial court to dismiss plaintiffs' lawsuit for lack of subject matter jurisdiction. *Rival*, 945 S.W.2d at 478.

*Rival v. Gant* has no bearing on the instant facts or the issue of Respondent's jurisdiction. The instant case does not involve a civil action brought by an injured employee under Section 287.780, asserting his employer discriminated against him for exercising his rights under the workers' compensation law. *Id.* *Rival* did not involve an approved settlement agreement compromising a compensation claim, and the issue of the jurisdiction, or lack thereof, of the Division or Industrial Commission to review that approved settlement agreement and resolve disputes as to medical care arising thereunder. *Id.*

Moreover, *Rival* discussed the jurisdiction or statutory authority of the Division to determine what medical treatment was reasonable or necessary to cure or relieve a work-related injury *in the first instance*, while a claim was pending before the Division, prior to its final resolution by hearing or settlement. *Rival*, 945 S.W.2d at 477-478. That decision did not address whether the Industrial Commission possessed jurisdiction or statutory authority, after a settlement agreement compromising a compensation claim had been approved, to determine whether an employee was entitled to medical treatment, where the issue was disputed and there was conflicting medical evidence. *Id.*

*Standard Register v. Mummert* is, likewise, inopposite. Like *Rival*, *Standard Register* addressed whether a civil action had to be dismissed because the allegations raised therein fell within the exclusive province of the Act. In a circuit court action, Ronald Snyder claimed he was wrongfully terminated by Standard Register for asserting

his rights under the Act. Liberty Mutual was Standard Register's compensation carrier. Vahl was a Liberty Mutual employee, who adjusted Snyder's claim. In his action, Snyder alleged Liberty Mutual, through the actions of its agent, tortiously interfered with his business expectation and relation with his employer, Standard Register, by refusing to authorize surgery, which purportedly prevented Snyder from returning to work within the guidelines established by Standard Register. Liberty Mutual and Vahl moved to dismiss, asserting the circuit court lacked subject matter jurisdiction, because the action fell within the exclusive jurisdiction of the Division, and failed to state a claim for tortious interference. When the circuit court denied the motion to dismiss, Liberty Mutual and Vahl sought and obtained a preliminary writ of prohibition. *Standard Register*, 880 S.W.2d at 926.

As the Eastern District observed, *State ex rel American Motorists v. Ryan* held prohibition would lie to prevent a circuit court from exercising jurisdiction over a tort action against an insurer and its agent for refusal to provide workers' compensation benefits to which a plaintiff asserted entitlement under the Act. This was precisely the nature of the action Snyder asserted against Liberty Mutual and its agent. *Id.*

Reduced to its essence, Snyder's claim was that Liberty Mutual and its agent should have authorized surgery sooner than they did. Had they authorized surgery sooner, Snyder maintained he would have been rendered fit for work under Standard Register's guidelines, and employer would not have fired him. Adjudication of this claim necessarily required a determination of whether Liberty Mutual had an obligation to authorize surgery under the Workers' Compensation Act. The determination of what sort

of care may reasonably be required to be provided to an injured employee fell within the exclusive province of the Division. Thus, the trial court exceeded its jurisdiction in refusing to dismiss the action against Liberty Mutual and its agent. *Standard Register*, 880 S.W.2d at 926-927. Making its preliminary writ of prohibition permanent, the Eastern District directed the trial court to take no further action, other than to dismiss the claims against the insurer and its agent. *Standard Register*, 880 S.W.2d at 927.

Like *Rival v. Gant*, *Standard Register v. Mummert* addressed whether a circuit court action had to be dismissed, since the relief sought and allegations asserted by the plaintiffs therein fell within the exclusive subject matter jurisdiction of the Division under the Act. And like *Rival*, *Standard Register* did not involve the issue of the Industrial Commission's jurisdiction, or lack thereof, to review an approved settlement agreement where future medical care is left open. *Id.*

*State ex rel Lester E. Cox Medical Center v. Wieland*, 95 S.W.2d 924 (Mo.App.S.D.1999), referenced by Respondent in its 8-14-14 Order, is also inopposite. At issue therein was whether an employer could utilize a prohibition action to obtain review over an ALJ's temporary award under Section 287.510, requiring the employer to provide an injured employee with medical care, including psychotherapy. *Lester E. Cox*, 985 S.W.2d at 924-925.

Flynn filed a claim against the Medical Center seeking workers' compensation benefits. ALJ Wieland issued a temporary or partial award against the Medical Center under Section 287.510, ordering the Medical Center to provide treatment to Flynn in the form of a medically-approved weight-loss program, together with psychotherapy for

depression. Medical Center sought and obtained from the circuit court a preliminary order in prohibition, directing the ALJ to refrain from all action in the claim until further order, and setting aside the temporary award. In obtaining the preliminary order in prohibition, Medical Center alleged it had no adequate remedy by way of appeal from the ALJ's temporary award. *Lester E. Cox*, 95 S.W.2d at 925. Subsequently, the circuit court entered a judgment, quashing its preliminary order in prohibition, and dismissing the Medical Center's petition for prohibition. *Id.*

The circuit court found the Division and Industrial Commission had exclusive jurisdiction over the determination of what was reasonable and necessary treatment under the Act, and Medical Center was required to exhaust all administrative remedies. *Id.* Medical Center appealed, arguing the circuit court had writ power which could be exercised to remedy the ALJ's failure to act within the confines of his jurisdiction and powers under the Act. *Id.*

Rejecting this contention, the appellate court found the Act was intended to be an exclusive remedy for injured workers. The determination of what sort of care as may necessarily be rendered to an employee fell within the exclusive province of the Division. Thus, the circuit court lacked subject matter jurisdiction to adjudicate matters relating to the propriety of a temporary award issued under Section 287.510. *Lester E. Cox*, 95 S.W.2d at 926. In so ruling, the court relied on both *Rival* and *Standard Register*. *Id.*

Section 287.510 provided for temporary or partial awards, which could be modified, and which were kept open until a final award could be made. ALJ Wieland's temporary award issued pursuant to Section 287.510 was not appealable by way of a



direct, immediate appeal. It was for this reason Medical Center maintained it had no adequate remedy at law. However, Medical Center possessed an adequate remedy. Judicial review was available under Section 287.495 after all administrative remedies were exhausted. That the Medical Center's eventual remedy might be unsatisfactory or inconvenient, alone, did not invoke the necessity for issuance of an extraordinary writ of prohibition. *Lester E. Cox*, 95 S.W.2d at 926-927. Like *Rival* and *Standard Register* on which it relied, *Lester E. Cox* addressed the authority of the Division and/or Industrial Commission to grant medical treatment to an injured employee, prior to final resolution of a claim. *Id.*

In its 8-14-14 Order, Respondent noted *Shockley v. Laclede Electric* and similar cases on which Relator relied were decided before the 2005 amendments to the Act, in particular, before the amendment to Section 287.800.1, mandating strict construction of the Act's provisions. Respondent suggested *Shockley* and similar decisions interpreting the Act under the prior version of Section 287.800, which required liberal construction, were premised upon what appellate courts believed Section 287.390 *contemplated*, rather than on the express language of that statutory provision. It went on to state that in light of the mandate in Section 287.800 that "courts strictly construe the Law, we are not convinced a court today would render a decision founded on what the court believes §287.390 *contemplates*. Instead, we think courts will base their decisions on what §287.390 *says*." (Ex.82-83).

Contrary to Respondent's suggestion, *Shockley*, *Mosier* and similar decisions holding that once an ALJ or the Industrial Commission approved a compensation



settlement, the jurisdiction of the Division and Industrial Commission over the claim was exhausted and at an end, did not rely upon the mandate of liberal construction codified in the predecessor to Section 287.800.1. See, e.g., *Shockley*, 825 S.W.2d at 48-49; *Mosier*, 205 S.W.2d at 232-233; *Derby*, 141 S.W.3d at 415. As a review of these and related decisions shows, the courts therein did not rely upon the rule of liberal construction in determining the jurisdiction of the Division and Industrial Commission in regard to an approved workers' compensation settlement. *Id.*

Respondent's analysis ignores the crucial fact that as an administrative tribunal, the Industrial Commission possesses only such jurisdiction and authority as is conferred on it by the Act, and can only do those things and make those orders which the Act authorizes. *Carr*, 49 S.W.3d at 207; *Ringiesen*, 539 S.W.2d at 62. The Industrial Commission must find authority to make orders in the Act, and possesses no authority, other than that which is granted to it by the Act. *Lakeman*, 872 S.W.2d at 505; *Carr*, 49 S.W.3d at 207. And, under the mandate of strict construction codified in Section 287.800.1, as amended in 2005, the Act cannot be applied to situations not falling clearly within its provisions and cannot be construed so as to confer a power or authority on the Division or Industrial Commission, which is not expressly granted therein. *Robinson*, 323 S.W.3d at 423; *Alcorn*, 277 S.W.3d at 828.

Keeping in mind, as the Court must, that the Act is entirely a creature of statute, and construing Sections 287.390 and 287.800.1 harmoniously, in *pari materia*, it becomes apparent that for the Division or Industrial Commission to possess jurisdiction or statutory authority over a compensation claim and a settlement agreement entered into

by the parties thereto following approval of that settlement agreement, the express language in Section 287.390 must so provide. *Hayes*, 192 S.W.3d at 707; *Robinson*, 323 S.W.3d at 423; *Wilcut*, 847 S.W.3d at 8-9. However, the clear and unambiguous terms of Section 287.390 do not so state. That section does not explicitly state that the Division and Industrial Commission have authority to review a workers' compensation settlement, order and/or hold additional proceedings, including an evidentiary hearing, once a settlement agreement compromising a claim has been approved, or to make a determination as to the rights and obligations of the parties under an approved settlement agreement. RSMo §287.390. Nor does any other section of the Workers' Compensation Act so provide.

In the absence of statutory language expressly investing the Division and Industrial Commission with jurisdiction and statutory authority to review an approved settlement agreement or act on a compensation claim which has been compromised by an approved settlement agreement, the Workers' Compensation Act did not confer jurisdiction on Respondent to review the Settlement Agreement, which ALJ Lane approved on 1-8-09, or remand the Claim to the Division for an evidentiary hearing on future medical care. Since Respondent lacked the statutory power to act in the manner that it did through its 8-14-14 Order, it acted without subject matter jurisdiction in issuing that Order. *Carr*, 49 S.W.3d at 207; *JCW*, 277 S.W.3d at 253. This result is based on what Section 287.390 says, not what a court, the parties, or Respondent believes that statutory provision *contemplates*.

That the Settlement Agreement left future medical care open does not, and cannot, confer jurisdiction on the Industrial Commission to review the approved Settlement Agreement or act thereon, as Industrial Commission suggests. Again, the Division possesses only that jurisdiction which is conferred upon it by the Act. The language in Paragraph 6 of the Settlement Agreement, whereunder employer agreed to provide future medical care for employee's work-related pulmonary condition, in the form of medical monitoring care through Dr. Ojile, cannot serve to confer jurisdiction on Respondent to review the Settlement Agreement or determine the rights and obligations of the parties thereunder, where the express language of the Act does not invest the Industrial Commission with such jurisdiction. *Hayes*, 192 S.W.3d at 707; *Ringiesen*, 539 S.W.2d at 62. This result is consistent with longstanding Missouri precedent, holding parties cannot confer subject matter jurisdiction by consent, where such jurisdiction does not otherwise exist. *St. Tax Cmsn. v. Administrative Hearing Cmsn.*, 641 S.W.2d 69,72 (Mo.1982)(subject matter jurisdiction cannot be conferred by consent or agreement of the parties); *McLean v. First Horizon Home Loan*, 277 S.W.3d 872,877 (Mo.App.W.D.2009).

Respondent states some courts have *assumed* it has authority to review post-award medical treatment disputes. It cites *Williams v. A.B. Chance*, 676 S.W.2d 1,4 (Mo.App.W.D.1984); and *Gill v. Massman Construction*, 458 S.W.2d 878,881 (Mo.App.W.D.1970), to support this proposition. Relatedly, Respondent asserts other courts had “*tacitly approved*” the Industrial Commission's action in ruling on the

necessity and work-relatedness of treatment rendered or recommended after a final *award* of future medical care. (Ex.83).

As these assertions show, Respondent fails to acknowledge the significant distinction between a workers' compensation award and an approved settlement of a workers' compensation claim, for purposes of whether the Division or Industrial Commission possess jurisdiction to act upon the same. Provisions of the Workers' Compensation Act permit modification of *awards* of permanent total disability and death benefits. However, no provision of the Act authorizes the Industrial Commission to review, enforce, or modify an approved settlement agreement compromising a compensation claim.

Section 287.240(9) and 8 CSR 20-3.01(4) permit the Industrial Commission to modify *awards* of death benefits. If an employee is fatally injured, and subsequently dies as a result of injuries sustained due to a work-related accident or occupational disease, employee's dependents may recover death benefits. **RSMo** §287.240. Section 287.240 states employer shall pay to employee's total dependents a death benefit based on employee's average weekly wages during the year preceding the injury which resulted in employee's death. **RSMo** §287.240(2).

Industrial Commission regulations reflect the Commission's authority to modify death benefit awards. Those regulations state the Industrial Commission shall have sole authority to modify final awards allowing death benefits to dependents. The Industrial Commission may modify death benefit awards from time to time, upon its own motion, or upon motion by an interested party. Any motion for modification of a final death



benefit award must be made to the Industrial Commission. The movant must submit proof of the change of condition or status of the parties receiving death benefits. 8 CSR 20-3.010(4). The Court of Appeals has held Section 287.240(9) invests the Industrial Commission with jurisdiction over awards of death benefits, and confers on it authority to modify such awards. **RSMo** §287.240(9); 8 CSR 20-3.010(4); *Roth*, 356 S.W.3d at 789.

Similarly, the Industrial Commission possesses jurisdiction to modify *awards* of permanent total disability. Section 287.470 states upon its own motion or upon application of any party in interest on the ground of a change in condition, the Industrial Commission may at any time upon a hearing after due notice to the parties interested, review any award, and on such review may make an award ending, diminishing or increasing the compensation previously awarded. **RSMo** §287.470. Section 287.470 invests the Industrial Commission with continuing jurisdiction, so a permanent total disability award may be altered to reflect an unanticipated change in the injured employee's condition. *Tiller v. 166 Auto Auction*, 65 S.W.3d 1,3 (Mo.App.S.D.2001).

Section 287.530 permits the Industrial Commission to commute an *award* of benefits after the award becomes final. It states the compensation provided may be commuted by the Division or Industrial Commission and redeemed by the payment, in whole or in part, by employer of a lump sum which shall be fixed by the Division or Industrial Commission, which sum shall be equal to the commutable value of the future installments which may be due, taking account of life contingencies, the payment to be commuted at its present value upon application of either party, with due notice to the other, if it appears commutation will be for the best interest of employee, or it will avoid



undue expense or undue hardship to either party, or employee has removed or is about to remove from the United States, or the employer has sold or otherwise disposed of the greater part of its business or assets. **RSMo** Section 287.530.1. Compensation awards, although usually conditional, are subject to being made absolute by the Division or Industrial Commission through commutation to present value. *Wims v. Hercules Contracting*, 123 S.W.2d 225,229 (Mo.banc.1939). Under Section 287.530, an award of benefits may be commuted to a lump sum, in whole or in part. **RSMo** §287.530.

The Workers' Compensation Act confers jurisdiction on the Industrial Commission to review or otherwise act upon final *awards* in three circumstances: 1) the modification of an award of death benefits; 2) the modification of an award of permanent total disability benefits; and 3) the commutation of an award of benefits. **RSMo** §§287.240(9); 287.470; 287.530. Absent in the Act is any statutory provision, conferring jurisdiction or authority on the Industrial Commission to review, enforce, or otherwise act on an approved workers' compensation settlement. Neither Section 287.390, nor any other provision of the Act, confers jurisdiction on the Division or Industrial Commission to review a settlement agreement and resolve medical disputes arising thereunder, following its approval.

At issue in *Gill* and *Williams* was the authority of the Industrial Commission to issue an order regarding an injured employee's future medical expenses, and whether expenses incurred more than 180 days after a work accident could be awarded. *Gill*, 458 S.W.2d at 883-884; *Williams*, 676 S.W.2d at 4-5. *Gill* also addressed whether an Industrial Commission award, directing an employer to pay an employee's future medical

expenses, without stating specifically the type of medical expenses to which employee was entitled, was erroneous. *Gill*, 458 S.W.2d at 881.

In its 8-14-14 Order, Respondent excerpts a quote from *Gill*, discussing the Industrial Commission's authority to enter an order regarding future medical care. *Gill*, 458 S.W.2d at 881-882. (Ex. 83). The "order" discussed in this excerpt from *Gill* is that contemplated by the version of Section 287.140 in effect at the time of Gill's November 1966 accident. That version of Section 287.140 stated in addition to other compensation, employee shall receive and employer shall provide such medical, surgical, and hospital treatment as may reasonably be required for the first 180 days after the injury or disability, and thereafter, provide such additional similar medical treatment as the Division or the Commission by special order may determine to be necessary. *Gill*, 458 S.W.2d at 881. Unlike the current version of Section 287.140.1, the version of the Act in effect when the *Gill* and *Williams* decisions were handed down authorized the Industrial Commission to issue "special orders" regarding medical care. RSMo §287.140.1 (2005).

Accordingly, neither *Gill* nor *Williams* is dispositive on the question of Respondent's jurisdiction and the propriety of its 8-14-14 Order. As *Williams* recognized, the special order provision in the prior version of Section 287.140.1 authorized the Division and Commission to issue an order providing for an additional treatment when restoration from a work injury could not be completed within the first 180 days after the injury or disability. *Williams*, 676 S.W.2d at 4-5. Given the distinctions between the current version of Section 287.140.1 and that construed in *Gill* and *Williams*, Respondent's reliance on those decisions to support its conclusion that it

possessed jurisdiction to review the approved Settlement Agreement, and make a determination as to employer's obligation thereunder to provide employee with future medical care, was erroneous.

*Weiss v. Anheuser-Busch*, 117 S.W.2d 682,685-686 (Mo.App.1938), has no relevance to the jurisdictional issue. At issue therein was whether the Industrial Commission erred in granting future medical care in a temporary or partial award. *Weiss*, 117 S.W.2d at 685-686. The court found no error, since the Act then, as now, expressly provided a temporary or partial award of compensation may be made and may be modified from time to time to meet the needs of the case, and the claim can be kept open until a final award is made. *Weiss*, 117 S.W.2d at 685; **Mo.Stat.Ann.** §3344 (1929); §287.510 (2005). A grant of medical care in a temporary award was expressly permitted by statute, both in 1938 and at present. Thus, *Weiss* is inopposite, and the Industrial Commission erroneously relied on that decision in concluding it possessed jurisdiction to review the approved Settlement Agreement.

Contrary to the Respondent's finding in its 8-14-14 Order, *Rival v. Gant*, *Standard Register v. Mummert*, *Lester E. Cox Medical Center v. Wieland*, *Gill v. Massman*, *Williams v. A.B. Chance*, and *Weiss v. Anheuser-Busch* do not "firmly establish" the Industrial Commission's authority to rule on disputes regarding the necessity and causal connection of future medical treatment after an award is final. (Ex.83-84). None of these decisions confer jurisdiction or authority on the Industrial Commission to act in this manner. Nor do these decisions establish or recognize Industrial Commission jurisdiction

or authority to rule on disputes as to medical treatment arising under approved settlement agreements. Respondent's assertion is without merit, and must be rejected.

Citing *Cochran v. Travelers*, 284 S.W.3d 666 (Mo.App.S.D.2009); *Baxi v. United Technologies Automotive*, 122 S.W.3d at 92; and *Roller v. Steelman*, 297 S.W.3d 128,133-134 (Mo.App.W.D.2009), Respondent asserts Section 287.801 (2005) requires the Industrial Commission to rule on future medical care disputes after an award becomes final, "for the reason that the circuit courts cannot." (Ex.84).<sup>3</sup>

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<sup>3</sup> Respondent's discussion of Section 287.801 fails to acknowledge alternative avenues of relief available to Michael Alcorn and similar employees where disputes as to the reasonableness and necessity of medical care arise under a compensation settlement, wherein future medical care is left open, after that settlement is approved by an ALJ or the Industrial Commission. That relief comes in the form of a declaratory judgment action under Section 527.020 or an action for specific performance. **RSMo** §527.020; *Precision Investments*, 220 S.W.3d at 303. An employee can have a medical treatment dispute arising under an approved settlement resolved by filing a multiple count petition, wherein the employee joins a Section 287.500 action with an action for declaratory judgment or specific performance. *Id.* That being the case, neither Section 287.801, nor the limited jurisdiction of a circuit court setting in a Section 287.500 action, necessitate Industrial Commission review of approved workers' compensation settlements to resolve issues thereunder regarding reasonableness, necessity, and causal relation of medical care.

Section 287.801, to which the Industrial Commission refers, states:

“Beginning January 1, 2006, only administrative law judges, the commission, and the appellate courts of this state shall have the power to review claims filed under this chapter.” **RSMo** §287.801 (2005).

What is at issue herein is not the jurisdiction of the Industrial Commission to rule on the issue of future medical care after a workers’ compensation *award* becomes final. Rather, what is in dispute is the jurisdiction of the Industrial Commission to review an approved settlement agreement, and rule on issues of medical care arising under such a settlement agreement. Whether the Industrial Commission possesses authority to resolve medical disputes arising under a final *award* is irrelevant to the jurisdictional issue before the Court.

In its 8-14-14 Order, Respondent relies on *Cochran*, 284 S.W.3d at 670. (Ex.84). *Cochran* is distinguishable, and not dispositive on the jurisdictional issue before the Court.

In *Cochran*, the widow of an injured employee filed a Section 287.500 action in circuit court, seeking to recover survivorship benefits under *Schoemehl v. Treasurer*, 217 S.W.3d 901 (Mo.banc.2007), following the employee’s death. The ALJ’s award did not grant survivorship benefits under *Schoemehl*. Rather, the award granted the injured employee permanent total disability benefits. The Southern District held the circuit court sitting in the widow’s Section 287.500 action court not grant survivorship benefits under *Schoemehl*, since the issuance of a judgment granting such benefits would not be “in



accordance" with the award the widow sought to have enforced, as Section 287.500 required. *Cochran*, 284 S.W.3d at 671-672.

The case instanter deals with an approved settlement, not an award. At issue is the Industrial Commission's jurisdiction to review an approved settlement agreement, not the recovery of survivorship benefits under *Schoemehl*. Given these distinctions, Respondent's reliance on *Cochran* was misplaced. *Id.*

Like *Cochran*, *Roller v. Treasurer*, 297 S.W.3d at 133-134 is distinguishable from the instant facts. In *Roller*, an injured employee's widow petitioned a circuit court to reopen her late husband's claim, add her as a party, and modify the award, so as to grant her survivorship benefits under *Schoemehl*. After hearing, an ALJ issued an award, finding the injured employee was entitled to permanent total disability benefits from the Second Injury Fund. Neither employee nor the Fund appealed that award. *Roller*, 297 S.W.3d at 129-130. The Fund paid permanent total disability to Mr. Roller until May 2007, when he died of causes unrelated to his work injury. Thereafter, employee's widow requested the employee's disability benefits be paid to her under *Schoemehl*. The Division responded the award did not provide for benefits to the employee's survivors. It stated the widow would need to obtain a court order for benefit payments to continue. *Id.*

Thereafter, the widow filed a petition against the Fund, asserting as the injured employee's sole dependent, *Schoemehl* entitled her to continue receiving permanent total disability benefits from the Fund during her lifetime. The Fund sought to have the civil action dismissed, because the case had been final for years, and the issue of dependency was not raised at the time of the original hearing on the claim. The widow moved for

summary judgment, based on *Schoemehl*. In response, the Fund argued the widow's action was barred by *res judicata*, because the award did not adjudicate any survivorship rights or benefits. At an evidentiary hearing before the circuit court, the widow demonstrated she and the injured employee were married and remained married until employee's death, and employee's death was not due to his work injury. *Id.*

Thereafter, the circuit court granted summary judgment in favor of the widow. It found she had proven the factual issues, and based on its application of *Schoemehl*, the circuit court held as the injured employee's dependent, the widow was entitled to his disability benefits. The circuit court ordered reinstatement of those benefits, retroactive to May 2007. *Roller*, 297 S.W.3d at 130-131. The Fund appealed, and the appellate court reversed. *Roller*, 297 S.W.3d at 131.

As the court noted, decisions issued subsequent to *Schoemehl* held that Opinion could not be applied retroactively to cases which had achieved final resolution prior to the Supreme Court's issuance of *Schoemehl* in January 2007. *Roller*, 297 S.W.3d at 132. Mr. Roller's award of permanent total disability was final 30 days after the ALJ entered that award in April 2003, almost 4 years before the Supreme Court issued *Schoemehl*. That Mr. Roller died in May 2007, after the *Schoemehl* decision was issued, was irrelevant. Since Mr. Roller's claim for compensation was not pending within the relevant time period, *Schoemehl* did not apply. *Roller*, 297 S.W.3d at 133.

That the widow filed her petition for payment of benefits in the circuit court, and not the Industrial Commission, did not alter this result. The circuit court lacked the authority to reopen and modify the final award, so as to grant the widow survivorship

benefits. This was illustrated by *Cochran. Roller*, 297 S.W.3d at 133. The widow failed to cite any statutory authority for bringing her petition in circuit court. Section 287.500 provided a means by which a final award could be enforced. However, Section 287.500 did not afford a circuit court any discretion in entering its judgment. The circuit court could only enter a judgment in accordance with the award. *Roller*, 297 S.W.3d at 133-134.

In her circuit court petition, the widow sought to have her deceased husband's claim reopened and modify its terms so as to grant her *Schoemehl* benefits upon employee's death. The circuit court lacked authority under Section 287.500, or any other statute, to do this. Since the circuit court lacked statutory authority to reopen the final award to modify or amend the award, or to compel the Fund to continue disability payments to the widow, the summary judgment in the widow's favor had to be reversed. *Id.*

*Baxi*, 122 S.W.3d at 97-98, is likewise inopposite. At issue in *Baxi* was whether a circuit court was required to provide notice to an employer before issuing a judgment on a workers' compensation award under Section 287.500. Because a circuit court had no discretion under Section 287.500, and had to enter a judgment in the amount of the award, and because there were no further factual issues to be resolved in a Section 287.500 action, due process did not require notice prior to the rendition of a judgment under that statutory provision. *Baxi*, 122 S.W.3d at 97. *Cochran, Roller* and *Baxi* do not provide support either for Respondent's finding that it possessed jurisdiction over the

approved Settlement Agreement, or its remand of the Claim to the Division for an evidentiary hearing on future medical care.

The Industrial Commission finds if a final award grants future medical care to cure or relieve a work injury or if a final award leaves future medical care open, it retains authority to determine the necessity and reasonableness of the requested treatment, and whether such treatment is causally related to, and flows from, the work injury. Respondent cites Sections 287.560 and 287.140.2 to support this finding. (Ex. 84). Section 287.140.2 authorizes the Division and Industrial Commission to direct a change of medical provider in certain instances. **RSMo** §287.140.2. Section 287.560 authorizes the Division and Industrial Commission to award the costs of the proceedings. Neither provision expressly confers jurisdiction on the Industrial Commission to determine whether medical treatment sought by an employee after an award becomes final is reasonable and necessary, so as to require an employer to provide such care. **RSMo** §§287.140.2; 287.560.

Section 287.560, to which Respondent refers in its 8-14-14 Order, lends no support to the Industrial Commission's jurisdictional findings. (Ex.84). Section 287.560 provides if the Division or Industrial Commission determines any proceedings have been brought, prosecuted or defended without reasonable grounds, it may assess the whole cost of the proceedings against the party who brought, prosecuted or defended them. **RSMo** §287.560; *Clark v. Hart's Auto Repair*, 274 S.W.3d 612,618 (Mo.App.W.D.2009). Section 287.560 is discretionary. The statutory language and case law do not compel an award of costs. *Nolan v. Degussa Admixtures*, 276 S.W.3d 332,335

(Mo.App.S.D.2009). An ALJ or the Industrial Commission should only exercise discretion to award the cost of proceedings under Section 287.560 where the issue is clear and the offense egregious. *Wilson v. C.C. Southern*, 140 S.W.3d, 115,120 (Mo.App.W.D.2004).

Within the meaning of Section 287.560, an employer's defense is without reasonable grounds where employer offers absolutely no ground, reasonable or otherwise, for refusing benefits clearly owed to an employee because the employee's injury was indisputably work-related. See for example, *Stillwell v. Universal Contractors*, 922 S.W.2d 448,457 (Mo.App.W.D.1996), holding a deceased employee's representative was entitled to an award of costs against an employer for wrongfully denying payment of an employee's burial expenses for nearly 5 years, without providing any basis for its refusal.

*Clark v. Hart's Auto Repair*, 274 S.W.3d at 618, affirmed an award of costs under Section 287.560. Clark was injured at work when he fell from a ladder. As a result of the accident, Clark underwent 9 surgeries on his right leg. *Clark*, 274 S.W.3d at 614. When Clark filed a claim, Hart's filed an answer, denying the claim. Hart's did not dispute Clark was working in the course and scope of employment when he was injured. The issues for resolution at hearing were nature and extent of permanent disability, liability for past and future medical care, and attorney's fees and costs. *Id.* After hearing an ALJ found Clark was permanently and totally disabled. He granted Clark future medical care and awarded costs against Hart's, finding it defended the claim without reasonable grounds. The Industrial Commission upheld the award of costs. *Clark*, 274 S.W.3d at 615.



The Western District, likewise, affirmed the grant of costs. Hart's claimed the award of costs was not supported by competent and substantial evidence. The Industrial Commission found Hart's stymied all efforts to settle the case. Employer's attorney admitted Hart's would not respond to his phone calls when he sought authority to make a settlement offer, and refused to accept his phone calls when he tried to relay employee's settlement demands. *Clark*, 274 S.W.3d at 617-618. After the ALJ directed the parties to mediate the case on the morning of hearing, Hart's prevented any meaningful mediation, refusing to accept its attorney's calls. The refusal to provide any settlement authority where Hart's not only admitted the accident and liability, but its own evidence was clearly contrary to its zero dollar offer position, amounted to an unreasonable defense. *Clark*, 274 S.W.3d at 618.

That Hart's was liable for Clark's work-related injury was not disputed. The only dispute was extent of disability. Although Hart's conceded its physician found a certain percentage of disability, it spurned all efforts to resolve the matter, forcing a hearing. Hart's refused to make any settlement offer, even rejecting attempts by its own attorney to obtain settlement authority. Equally troubling was Hart's unwillingness to engage in mediation of the case on the morning of hearing. Even though Hart's admitted accident and liability, it refused to listen to settlement demands and negotiate in good faith, without justification. Hart's defense, if one existed, was contrary to its own evidence. Thus, its conduct was unreasonable, and the Industrial Commission did not err in granting an award of costs. *Clark*, 274 S.W.3d at 618-619.

Per its express terms, Section 287.560 does not address workers' compensation settlements. As such, it provides no support for Respondent's finding, in its 8-14-14 Order, that it possessed jurisdiction to review the approved Settlement Agreement and determine the rights and obligations of the parties thereunder, and its action of remanding the Claim to the Division for an evidentiary hearing on medical care. Moreover, neither Section 287.560 nor Section 287.390 confers jurisdiction on the Division or Industrial Commission to grant an award of the cost of proceedings after a claim has been compromised by an approved settlement agreement. **RSMo §§287.560;287.390.** Accordingly, Respondent's reliance on Section 287.560 is misplaced.

Like Section 287.560, Section 287.140.2 does not confer jurisdiction on the Industrial Commission to review the approved Settlement Agreement, and determine the scope of employer's obligation under that Agreement to provide employee with medical care for his work-related pulmonary condition. Section 287.140.2 states if it be shown to the Division or Industrial Commission that the requirements are being furnished in such a manner that there is a reasonable ground for believing the life, health, or recovery of employee is endangered thereby, the Division or the Industrial Commission may order a change in the physician, surgeon, or hospital. **RSMo §287.140.2.**

Section 287.140.2 provides a remedy to an employee for inadequate medical care or medical care believed to be dangerous to employees' health. *Wiley v. Shank and Slattery*, 848 S.W.2d 2,5 (Mo.App.W.D.1992). That statutory provision allows the Division or Industrial Commission to address the manner in which medical treatment is being provided to an injured employee by a physician authorized by the employer to treat

a work injury. *Noel v. ABB Combustion Engineering*, 383 S.W.3d 480,485 (Mo.App.E.D.2012).

Section 218.140.2 presupposes that the Division or Industrial Commission possesses jurisdiction over a claim for compensation. That statutory provision does not invest the Division or Industrial Commission with jurisdiction to make a determination as to the safety of medical treatment provided to an injured employee, where a claim is not pending before the Division or Industrial Commission, or where a claim has been compromised by an approved settlement agreement. Accordingly, Section 287.140.2 does not support Respondent's issuance of its 8-14-14 Order or provide authority therefor. *Id.*

The question before the Court is not the authority or jurisdiction of the Industrial Commission to rule on the issue of future medical care after a compensation *award* becomes final. Thus, even *assuming* Respondent was correct in finding it retained authority to resolve disputes as to medical care after an award becomes final, such authority does not extend to Industrial Commission review of approved settlement agreements, and the resolution of medical disputes arising under such agreements. *Derby*, 141 S.W.3d at 416-417.

In its 8-14-14 Order, Respondent failed to cite any statutory provision or Missouri appellate decision, demonstrating it possessed jurisdiction to review or enforce the approved Settlement Agreement, to remand the Claim to the Division for an evidentiary hearing on the issue of medical care, or, once that hearing was undertaken, to determine the rights and obligations of employer and employee under the Settlement Agreement.

(Ex.80-85). The legal analysis in Respondent's 8-14-14 Order is a little more than a bald assertion that it possessed jurisdiction to review the approved Settlement Agreement, to determine the reasonableness and necessity of the requested medical care (inhaler medications), and whether such medical care was causally related to and flowed from employee's work-related pulmonary condition. Neither the Act, nor caselaw construing the Act, supports Respondent's assertion of jurisdiction. The Industrial Commission is not free to waive its lack of subject matter jurisdiction to review the approved Settlement Agreement. *McLean*, 277 S.W.3d at 877.

That employer promised to provide future medical treatment, in the form of medical monitoring care, does not and cannot serve to confer subject matter jurisdiction on the Industrial Commission to review the Settlement Agreement, and determine the rights and obligations of the parties thereto, where the Act does not invest the Industrial Commission with such jurisdiction. *St. Tax Cmsm.*, 641 S.W.2d at 72. Respondent's finding that it had authority to review the approved Settlement Agreement herein, based in part on ISP Minerals' promise under Paragraph 6 of the Settlement Agreement to provide future medical care, is erroneous, and without support, either in the Act or caselaw construing the Act. (Ex.84). *Id.*

Respondent reasons to hold it does not have jurisdiction to review the approved Settlement Agreement, "in the absence of any clear authority or mechanism for review by the appellate courts, would seem to render such settlements unenforceable." (Ex.84). This reasoning ignores the fact that where issues arise as to the nature and extent of an employer's obligation to provide medical treatment to an employee under an approved

settlement, an employee can obtain resolution of those issues by filing an action for declaratory judgment or an action for specific performance in circuit court.

In fact, an employee could file a 2-count petition in such a situation, one count seeking a judgment on the approved settlement agreement under Section 287.500, and a second count, seeking a determination of the employer's obligation under the settlement agreement to provide medical care, through either a declaratory judgment or specific performance action. Any judgment rendered by the circuit court in the declaratory judgment or specific performance count could be reviewed by an appellate court on direct appeal. That being so, both the approved settlement agreement and the judicial declaration of the rights and obligations of the parties to that approved settlement agreement would be subject to appellate review. Respondent fails to take into account the availability of these equitable remedies where an issue arises as to the provision of future medical care under an approved settlement agreement.

This option was available to Michael Alcorn. In fact, during proceedings before the Iron County Circuit Court in employee's Section 287.500 action, employer asserted employee could seek to have employer's obligation, if any, under Paragraph 6 of the Settlement Agreement to provide employee with inhaler medications adjudicated by a declaratory judgment or specific performance action. Employee's counsel conceded such relief could be obtained through an action for specific performance. Respondent's fear that an approved settlement agreement would not be reviewable is without foundation.



## C.

**RELATOR ISP MINERALS HAS NO ADEQUATE REMEDY TO CHALLENGE RESPONDENT INDUSTRIAL COMMISSION'S 8-14-14 ORDER BY APPEAL OR OTHERWISE; AND ABSENT THE ISSUANCE OF AN ABSOLUTE WRIT OF PROHIBITION BY THIS COURT, RELATOR WILL SUFFER IMMEDIATE AND IRREPARABLE INJURY.**

Relator ISP Minerals has no remedy by way of direct appeal. The court of appeals possesses no jurisdiction in a workers' compensation case, except where it is expressly provided for by statute. *Smith v. SEMO Paint & Supplies*, 99 S.W.3d 11,13 (Mo.App.E.D.2002). Section 287.495 of the Workers Compensation Act states only final awards of the Industrial Commission may be appealed to the Court of Appeals. **RSMo §287.495.** Respondent's 8-14-14 Order, remanding the Claim to the Division for an evidentiary hearing, is not a final and appealable award. A final award, within the context of the Workers Compensation Act, is an award which disposes of the entire controversy between the parties. *Korte v. Fry-Wagner Moving & Storage*, 922 S.W.2d 395,397 (Mo.App.E.D.1996). Finality is found where the Industrial Commission arrives at a terminal, complete resolution of the claim for compensation before it. *Smith*, 99 S.W.3d at 13.

Respondent's 8-14-14 Order did not result in a complete resolution of all issues pertaining to the Settlement Agreement and employer's obligation to provide medical care thereunder. Rather, the Order remanded the Claim to the Division for an evidentiary hearing on the issue of medical care. Once that hearing was held, and the transcript of

the same was prepared, the transcript was to be forwarded to the Industrial Commission, which would allow the parties to brief the issue of future medical care. (Ex.80-85). An order such as that issued by Respondent on 8-14-14 is not a final and appealable award, for purposes of Section 287.495. *Id. Korte*, 922 S.W.2d at 397. Thus, Relator ISP Minerals possesses no expeditious or adequate remedy by way of appeal. *State ex rel. Parker v.City of Independence*, 272 S.W.3d 371,375 (Mo.App.W.D.2008). The instant prohibition proceeding is the only remedy available to Relator to address Respondent's 8-14-14 Order, which was issued without and in excess of the Industrial Commission's jurisdiction under the Workers' Compensation Act. *Id.*

Unless the instant Court makes its Preliminary Writ Of Prohibition absolute, Relator ISP Minerals will face immediate and irreparable injury. *Anheuser-Busch*, 887 S.W.2d at 737. Relator will be compelled to prepare for and participate in an evidentiary hearing before the Division regarding the issue of medical treatment. This will require employer to have employee examined by a physician, to determine employee's current medical condition and need for the medical care in issue. Employer will have to depose that expert physician regarding his findings and opinions. Additionally, ISP Minerals will be required to appear at and participate in the deposition of employee's medical expert. ISP Minerals will need to depose Michael Alcorn, and will be required to obtain records regarding the medical treatment employee has undergone since ALJ Lane's approval of the Settlement Agreement on 1-8-09.

After undertaking these preparatory tasks, employer will be required to participate in the evidentiary hearing before the Division, regarding the issue of medical treatment.

Once that hearing is completed, Relator will be required to draft and present a brief to Respondent Industrial Commission regarding employer's obligation to provide future medical treatment to employee pursuant to paragraph 6 of the Settlement Agreement, and the authority of Respondent to review the approved Settlement Agreement and rule on the issue of medical care.

As a consequence of Respondent's 8-14-14 Order, Relator ISP Minerals will be obligated to engage in these activities, even though the Division and Industrial Commission do not possess jurisdiction over the approved Settlement Agreement or employee's Claim For Compensation. Absent an absolute Writ Of Prohibition, employer will be subjected to unnecessary, inconvenient and expensive litigation before both the Division and Industrial Commission. *Anheuser-Busch*, 887 S.W.2d at 737. In light of the foregoing, it is imperative the Court make its Preliminary Writ Of Prohibition absolute. *Premiere Marketing*, 2 S.W.3d at 121.

### **Conclusion**

The instant Court must make its Preliminary Writ Of Prohibition absolute. Neither Section 287.390, nor any other provision of the Workers' Compensation Act, invests the Industrial Commission with jurisdiction to review an approved settlement agreement and order an evidentiary hearing regarding the rights and obligations of the parties to that settlement agreement. Once ALJ Lane approved the Settlement Agreement between ISP Minerals and Michael Alcorn in the workers' compensation action, the jurisdiction of the Division and Industrial Commission over Michael Alcorn's Claim For Compensation, and concomitantly, the approved Settlement Agreement, was exhausted.

and came to an end. Respondent acted without and in excess of its jurisdiction under the Workers' Compensation Act in finding it possessed jurisdiction to review the approved Settlement Agreement and determine employer's obligation thereunder to provide employee with future medical care, and in ordering the Division to hold an evidentiary hearing on the issue of medical treatment. The Industrial Commission's issuance of its 8-14-14 Order was an act undertaken without subject matter jurisdiction. Thus, prohibition lies to permanently bar Respondent Industrial Commission from enforcing that Order.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

A copy of the foregoing document was filed with the Missouri electronic filing system this 16th day of January, 2015, which will send a copy to: Ms. Nancy Mogab, 701 Market Street, Suite 1510, St. Louis, Missouri 63101 (314-241-4477), attorney for Respondent; and to John Larsen, Jr., James Avery, Jr., and Curtis Chick, Jr., at Labor & Industrial Commission, 3315 West Truman Boulevard, Jefferson City, Missouri 65102 (573-751-2461).

/s/ Mary Anne Lindsey

**CERTIFICATE OF COMPLIANCE**

This Brief complies with Rule 84.06(b)(1) and contains 20,485 words. To the best of my knowledge and belief, the copy of the Relator's Brief forwarded to the Clerk of the Court, via electronic mail, in lieu of a floppy disc or CD, has been scanned for viruses, and is virus-free.

/s/ Mary Anne Lindsey